78-1180

Supreme Court, U. S.
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No.

In the

Supreme Court of the United States

BENJAMIN JULIAN ROSENTHAL,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Benjamin Julian Rosenthal, respectfully prays that this Court's Writ of Certiorari issue to the Supreme Court of Illinois to review the Judgment of that Court which imposed upon Petitioner, an attorney, the penalty of disbarment.

In that behalf, Petitioner here sets forth the information required by Rule 23.

REFERENCE TO REPORTS

Disbarment proceedings in Illinois originate as an administrative hearing before the Respondent Commission. Its Inquiry Board files a complaint before its Hearing Board, which renders a preliminary decision. That decision is submitted to the Commission's Review Board. If

the Review Board recommends disbarment, its report is filed before the State Supreme Court, which takes original judicial action in the matter.

The opinions of the Commission's Boards are not publicly reported in any form. The Hearing Board Report is here presented as Appendix A to this Petition and the Report of the Review Board is reproduced as Exhibit B.

The opinion of the Supreme Court of Illinois has been published and appears at 382 N.E. 2d 257 and is here reprinted as Appendix C.

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) The original judgment of the Supreme Court of Illinois (Appendix C) was entered on October 6, 1978.

(ii) A Petition for Rehearing was timely filed and was denied by order entered on December 1, 1978. (Appendix D) No extension of time for filing this Petition has been requested or granted.

(iii) Jurisdiction to review that judgment by certiorari is conferred under the provisions of Title 28 U.S. Code, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Does failure to distinguish between a victim of extortion and perpetrator of bribery deny Rosenthal procedural due process of law where he, as a lawyer for a victim of extortion, acted as a witness for the United States in Federal criminal proceedings in exposing official corruption, and where he himself had been a victim of threats of physical and economic harm?

2. Is disbarment here a denial of due process and equal protection of the laws in violation of the United States Constitution?

3. Does disbarment violate due process when based upon unclear, vague and indefinite standards?

4. Is the District Court Order of March, 1973 extending immunity to Rosenthal under 18 U.S.C. 2418 valid and binding upon the Illinois Attorney Registration and Disciplinary Commission as required by the proper application of:

   (a) The Writs Act, 28 USC § 1651,
   (b) The Court's inherent common law power,
   (c) The Supremacy Clause of Article VI of the United States Constitution.

5. Does the disbarment of Rosenthal constitute cruel and unusual punishment in violation of Amendment 8 of the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES

Article VI of the Constitution of the United States provides, in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof • • • shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby • • •"

The Fifth Amendment to said Constitution contains the following provisions:

> "No person . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to said Constitution contains the following provision:

AMENDMENT (VI)

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

The Eighth Amendment to said Constitution contains the following provision:

> ". . . nor cruel and unusual punishment inflicted . . ."

Section 1 of the Fourteenth Amendment to said Constitution contains the following provision:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The "Writs Act", 28 U.S.C.A. § 1651 provides in relevant part:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Also see 18 USC 2418.

PREFACE

This Matter came before the Illinois Supreme Court as a result of disciplinary proceeding brought before the Attorney Registration and Disciplinary Commission. By its decision, the lower Court sustained the recommendation of the Commission that Rosenthal and Carnow be disbarred.

On page 3 of the slip opinion issued in this case, the Court states as part of its factual recitation as follows:

> "Zima informed the respondents that there be no special counsel and that his 'obligations' were now theirs. Rosenthal objected and indicated that he would go to Federal Authorities, to which Zima responded that if Rosenthal did so, he and Carnow would never again practice law in the City of Chicago."

Through ironical happenstance Zima's threats have come to pass.

As it happened, Rosenthal and Carnow cooperated with the government prosecution and testified against Zima. As a result, the United States Attorney in his August 7, 1975 letter to the Disciplinary Commission wrote:

> "Mr. Rosenthal was truthful at all times with agents of the Government, and likewise was readily available to assist us during our preparation for trial."

As an additional result of Rosenthal's and Carnow's cooperation with the United States Attorney's Office, the Disciplinary Commission was able to bring this matter to the Illinois Supreme Court which affirmed the recommendation of disbarment. Rosenthal and Carnow now face the harsh realty of Zima's threat.

STATEMENT OF FACTS

In May of 1975 Stanley Zima, Secretary to the Committee on Building and Zoning of the Chicago City Council, was convicted of extortion and income tax evasion in the case of *United States* v. *Stanley Zima,* 74 CR 66. It was proven beyond a reasonable doubt that Zima was guilty of extorting $20,000 from Joseph Pecord under threat of defeating his petition to allow the opening of a nursing home in an area of Chicago zoned as a business service district (B4-2) (Tr. 263)*. This prosecution, the first successful criminal action dealing with political corruption in zoning matters, was made possible by reason of the testimony of Pecord's attorneys, Rosenthal and Carnow (under a grant of transactional immunity) on behalf of the United States (Tr. 192, 248).

On September 2, 1976 the administrator of the Illinois Attorney Disciplinary System filed a complaint against Rosenthal and Carnow alleging that they were guilty of conduct which tends to bring the legal profession into disrepute, and essentially charging them with assisting their client, Pecord, in making a payment on September 5, 1969, which Zima demanded to assure the desired zoning variance to which Pecord was lawfully entitled. Specifically Rosenthal was charged with (a) concealing or failing to disclose the existence of criminal activity; (b) counseling, assisting and participating in conduct which furthered a crime; (c) engaging in conduct prejudicial to the administration of justice adversely reflecting on his fitness to

* Transcript pages from the Disciplinary hearing are denoted by "Tr.", the transcript from *U.S.* v. *Zima* is identified by "Cr.".

practice law; and (d) engaging in conduct involving the appearance of impropriety.

The presentation of the Administrator's case consisted in essence only of the testimony of Rosenthal and Carnow, beginning with the criminal case transcripts. There is no evidence in the record to contradict their testimony as to the events which occurred, and the interplay of emotions and experiences surrounding their entanglement.

Rosenthal had represented Pecord in various legal matters, beginning in 1967 until his death in January of 1973 (Cr. 258), during which period they had become close personal friends (Tr. 146). Pecord had personally entered into a contract for the purchase of the Beverly Bank Building at 80th and Western, Chicago, Illinois, at a price of $1,200,000, towards which he made a $50,000 earnest money deposit. In this first contract the seller was responsible for obtaining the proper "spot" zoning so that the bank building, which had long been vacant, could be converted by Pecord into a nursing home in this "business service district" (B4-2) (Tr. 261-265).

Because of transfers of title of the Beverly Building to the Federal Savings and Loan Insurance Corporation, Pecord entered into a similar purchase contract with that corporation, except Pecord's performance was no longer contingent on the seller's obligation to obtain the zoning change — that obligation was now on his shoulders at the insistence of the FSLIC which then was Republican oriented and fearful of what it considered Democratic control of the Chicago zoning. In addition to the earnest money deposit which he had made, Pecord was also out of pocket another $150,000 or more spent in preparation for the building conversion and the Nursing home project (Cr. 264-265). Pecord's purchase money financing was

dependent upon securing the proper zoning, without which, of course, the project could not proceed (Cr. 274). As matters stood in April of 1969, Rosenthal's friend and client, Pecord, had his entire net worth on the line dependent upon the zoning. The contract was to be closed on July 1, 1969.

The *Finding of Fact* portion of the *Report of The Hearing Panel* properly describes the situation as follows:

> "1. There is no question but that the Respondents were retained by Pecord for a lawful legal purpose, i.e. to obtain a zoning variance. Further there is no question that Pecord's intentions were honorable and his desire to convert the Beverly Building to a nursing home was a laudable thing.
>
> 2. Had the Respondents failed to obtain the zoning variance their client, Pecord, would have lost considerable sums of money. It was, therefore, of great importance that the Respondents succeed.
>
> 3. Based on the record before us, we find that Pecord was entitled to the zoning variance he requested. . . ."

In April of 1969, Carnow, then doing part-time legal work for Rosenthal, was sent to the City Clerk's office to learn what was involved in filing a citizen's ordinance in the Pecord matter for a zoning amendment, to pick up materials to that end and to ascertain the earliest possible hearing date (Cr. 31-32; Tr. 157-159). The Clerk's office referred him to the offices of the Chicago City Council Committee on Building and Zoning (Cr. 31). It was there that he chanced to meet Zima (Cr. 32, 33; Tr. 359). Carnow had become acquainted with Zima in 1967 when Zima was a candidate for Alderman of the 10th Ward, where Carnow then lived with his mother.

In April of 1969 Zima was the Secretary to the Committee of Building and Zoning (Tr. 161), and when he saw Carnow in the office he asked the reason for his presence, whereupon the nursing home project was explained to him (Cr. 44-46). Zima said that he would need "a spot zoning use" which the City wouldn't give him, to which Carnow replied that they would take it to court if turned down (Cr. 46). Zima introduced him to Ralph Metcalfe (Cr. 46), then the Committee Chairman (Tr. 270), and Metcalfe told him that zoning was the prerogative of the local Alderman, John Daley, who he must see (Cr. 47).*

During 1968 Pecord had, in another project also in the 18th Ward, gone to John Daley to get his assistance in a zoning matter. Daley had demanded a large sum of money which Pecord refused to pay. It followed that he could not get the zoning and as a result several hundred thousand dollars were lost on the project (Tr. 135-139, 166).

Upon Carnow's departure from the Zoning Committee offices, Zima offered him friendly assistance in drafting the petition (Tr. 34; CR. 50). Carnow later brought him a draft and Zima aided him in revising it for filing on May 13, 1969 (Tr. 34-35; Cr. 53). They were given a June 20th hearing date (Cr. 54; Tr. 268).

On or about June 17th Zima called Carnow and told him he wanted to see him (Cr. 54; Tr. 36-37). He told him that the petition was in trouble, that he could help but it might cost money. Carnow told him he should talk

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* John Daley was never consulted by Pecord, Rosenthal or Carnow with respect to this matter. John Daley was in actuality the Democratic Ward Committeeman who acted in concert with Alderman Edward J. Hines. (Cr. 260, Zoning Board Record).

to Pecord or Rosenthal and a meeting was set for the next day (Cr. 55; Tr. 37).

Rosenthal and Carnow had decided to meet with Zima on the 18th of June, 1969 to see what they were up against and to "dry run" their committee presentation before Zima (Tr. 159, 366). It was at this meeting that Rosenthal first met Zima (Tr. 86) and he proceeded to tell him about the project and the presentation he would make at the hearing of the 20th (Tr. 87-88; Cr. 57, 268). In response Zima said that the project was doomed because John Daley would object. He might be able to help because of a special bill pending before the City Council that would transfer the matter to the Zoning Board of Appeals. His help would not be a favor, the bill would have to be passed, he would provide them with "professional" counsel who would know how to handle it (Tr. 160), he would undertake multiple obligations (Cr. 58), there would be costs involved, all of which could amount to almost $30,000. Zima indicated that it could be paid as a political gift or attorney's fees.

In response to this solicitation Rosenthal said that he would prevail on the merits, and if not they would get declaratory relief in the courts (Tr. 89), he wasn't interested in Zima's proposition and would not recommend it to his client (Tr. 59; Cr. 269).

The hearing went ahead on the 20th of June, 1969, and Rosenthal put on an elaborate case before the Committee with several witnesses. Predictably John Daley opposed the petition along with a couple of neighborhood residents. The Committee first deferred their decision, effectively preventing them from taking the matter into Court because of failure to exhaust administrative remedies. (Tr. 166; Cr. 271), then it was defeated after it was too late to

procure declaratory relief through the Courts because of the FSLIC's refusal to grant a sufficient extension of time to close.

The Hearing Panel's *Finding of Fact* number 3 (quoted in part above) and 4 (in part) are quoted as follows:

> "3. Based on the record before us, we find that Pecord was entitled to the zoning variance he requested but that the variance was denied him because of political implications brought forward by the Ward Committeeman.
>
> 4. Stanley Zima, then the Secretary to the Committee of Building and Zoning, was in a position to see to it that Pecord's request for a variance was either granted or denied. . . ."

After the hearing Rosenthal told Pecord that he was forewarned of Daley's objections and that realistically his political influence would probably prevail. No mention was then made of Zima's solicitation, but the new special use ordinance was mentioned as a hopeful alternative, and Pecord pleaded that Rosenthal save him from financial ruin (Tr. 90-93). Rosenthal specifically attempted to dissuade Pecord from considering anything but the pursuit of legal means to achieve the zoning (Tr. 167-168). He asked Pecord to get an extension on the closing date so they could take the zoning to court (Cr. 272-273).

About a week after the Committee Hearing, Rosenthal, through Carnow, was advised that Zima had called to tell them of the passage of the special ordinance shifting the matter to the Zoning Board of Appeals (Tr. 45-46, 61-64). Rosenthal enthusiastically decided to file again and, without Zima, to obtain the zoning on the merits (Cr. 65), and he called Pecord and dictated a letter to the FSLIC requesting an extension of time on the contract closing

in light of the new ordinance (Tr. 170, Resp. Ex. 1). A short extension was ultimately granted by the FSLIC (Cr. 276), although on July 1, 1969 Pecord lost his loan commitment from the Michigan Avenue National Bank (Cr. 274).

On July 1st Zima again called Carnow and asked what their client was going to do about the Beverly Building. He was told that they had already prepared their application to the Zoning Administrator and that they would get zoning on the merits. Zima replied that Pecord should be told to deal with him, or else he would not get his zoning (Cr. 65-66; Tr. 45). Around the second week of July Zima called again to warn Carnow that the Zoning Administrator would recommend against the zoning that Zima had talked to Pecord, and he would go bankrupt through a long court fight. A few days later he again called Carnow and warned him to tell Pecord to pay or else, that he could do it for $20,000 (Cr. 67-68; Tr. 47-49). This call was related to Ben Rosenthal (Tr. 50, 95) and he in turn, in late July of 1969,, finally related the message to Pecord (Tr. 180).

The Hearing Panel's *Finding of Fact* number 4 (quoted in part above) is stated in full as follows:

> "4. Stanley Zima, then the Secretary to the Committee of Building and Zoning, was in a position to see to it that Pecord's request for a variance was either granted or denied. Zima demanded $20,000 for this "assistance" which meant that unless the *extortion* money was paid, no variance would be granted." (Emphasis added.)

Rosenthal advised his client that he felt that they would succeed before the Board of Appeals, however, since he was wrong before, he felt that they had to face the

possibility of losing before the Zoning Board unless Zima's zoning specialist was hired. Rosenthal recommended that Pecord renew his efforts to get Arthur Lorenz, the administrator of the FSLIC in charge of the sale of major assets (Tr. 104), to prevail upon the Washington FSLIC office for a sufficient extension to obtain an administrative review in the courts (Tr. 181). Rosenthal felt that administrative review would cause a full investigation to be made into the zoning situation in Chicago (Tr. 182).

Mr. Thomas J. Gordon, a Chicago real estate developer, testified that he had on occasion met with Ben Rosenthal and Joseph Pecord during July and August, 1969. Pecord had expressed his distress that he was being extorted but wanted Rosenthal to get the zoning any way he could. Rosenthal urged Pecord to go to the FSLIC or some other governmental agency and get an extension of time. He offered to go to Washington with Pecord to try to get an extension, and he advocated going into the courts to bring this thing out into the open. Rosenthal vitriolically argued against the extortion payment, and he told Pecord that he would not handle it on that basis, that he would only handle it if they could take it into court. Pecord insisted that he had no time, that he knew these people since he had dealt with them before, that there was personal animosity between him and John Daley, that he would not get an extension and his project was going to die (Tr. 132-133). Rosenthal felt that withdrawal as counsel was his only alternative, and that Pecord would have to take Zima's special counsel and deal through him (Tr. 134).

Lorenz, towards the end of July 1969, advised Pecord to proceed with his quest for zoning, that he could get no further contract extension, that he would attempt to

get him a price reduction to compensate for his added zoning costs. He further urged that Pecord should contact Zima with respect to the use of his special counsel and to meet Zima's demands (Tr. 183). Pecord instructed Rosenthal to contact Zima and ask for his help (Cr. 275).

Carnow was instructed by Rosenthal to call and tell Zima that Pecord was acceding to his demands that they would file the petition and then step aside to let Zima's counsel come in and handle the case (Tr. 54-56; Cr. 275). Zima had already found this out directly from Pecord, and he instructed Carnow to file the petition and that he would later inform him who the attorney would be to handle the case for them (Cr. 20). Rosenthal and Carnow felt compelled to file the special use request and then to withdraw as counsel (Tr. 373). The petition was filed on July 31st (Cr. 20) and a hearing was set on the petition for August 26, 1969 (Tr. 194).

As the date of hearing drew nearer and no substitute counsel had been provided by Zima, Rosenthal informed his client that they were going to withdraw. Pecord said that, because they had been so close he would not expect that Rosenthal would abandon him. He said that an attorney couldn't ethically desert a client when he was in trouble. His alternative would be to lose everything or to possibly go to John Daley for help—which would undoubtedly cost him twice as much. Rosenthal said that he was sorry, but he would have to withdraw, but that he would continue to consider the problem because he wanted to do what was best, and recommended that Pecord discuss the matter with other counsel. (Tr. 195-196). Later Pecord told Rosenthal that he had been told by other counsel that he was duty-bound not to desert his client as a victim of extortion (Tr. 240).

Just prior to August 15, 1969, Rosenthal told Carnow to contact Zima, since he had not yet informed Pecord of his substitute counsel so that they could withdraw from the matter (Tr. 194; CR. 71). Carnow called Zima and told him that they wouldn't go ahead with the application, they wouldn't handle it themselves (Cr. 72).

On the following day Zima came to their office infuriated. Rosenthal told him that they would not proceed, that they had never been in such a situation before (Cr. 73). Zima said that everything was set and they had to go ahead, that his multiple obligations were their obligations, and unless they went ahead Pecord's nursing home would not open (Cr. 72-74; Tr. 277). Rosenthal threatened to call in the Justice Department, the FBI, to which Zima replied, "you do that and you are in big trouble . . .", the nursing home will never open up and Pecord will be in trouble. You will never practice law again in the City of Chicago. Everything is set and you've got to follow through with your obligations. He further ordered them to tell their client to have four five thousand dollar checks ready for the day of the hearing (Cr. 74, 222-223, 277-278; Tr. 56, 97, 196-198, 244-246, 374).

Finding of Fact number 6 of the Hearing Panel reads as follows:

> "6. Respondents maintain and it is probably believable that they and their families were threatened by Zima with economic and bodily harm and that their client was threatened."

The record contains numerous references to the private turmoil which continued to engulf Ben Rosenthal and Don Carnow throughout and after the Zima shakedown into which they found themselves entrapped. The first

and most obvious problem was that the zoning was critical to the well-being of Joseph Pecord, Rosenthal's client and friend (Cr. 97-99). It was always felt that bringing Zima's activity to the prosecuting authorities at the time would not only fail to remove the blinders which were then worn by such authorities in the zoning corruption area, but that retribution for such a move would be their only result (Tr. 186-188, 199-201, 375-377). Additionally, Ben Rosenthal felt that he could not go to the authorities unless released to do so by his client, since by doing so his client could be harmed, both through the loss of any chance at zoning for his nursing home and by being further unable to continue doing business as a real estate developer in the Chicago area (Tr. 184, 239-240). When Zima failed to supply other counsel to handle the matter (no doubt in order to save the "fee" portion of his take), and Pecord would not let them withdraw to leave him hanging (Tr. 195), they became hopelessly entangled in the shakedown process. Zima's threats of August 16th made their participation in the payoff finally inescapable.

Zima's threats were not to be taken lightly, for along with his apparent position of pervasive political influence in the City of Chicago, his political power base was developed in a ward which was known to treat political opponents with physical violence (Tr. 374-377). Rosenthal testified that after the August 16th meeting he was ". . . not only concerned about the economic well-being of Mr. Pecord and his project, but I was concerned about the physical well-being of Mr. Pecord and his family, as well as Mr. Carnow and his family, and the physical well-being of, frankly, myself and my family. I was scared and my partner was possibly more scared." (Tr. 197-198).

Thus it logically followed that Zima's instructions were followed, the zoning was obtained, and $20,000 in cash

was passed from Pecord to Zima through Rosenthal and Carnow pursuant to the demands of Zima and at the direction of Pecord.

Based upon the above evidence, the Hearing Panel recommended that Rosenthal and Carnow be disbarred, and the Review Board concurred, stating that the evidence is clear and convincing that the attorneys "maintained contact with the extortionist by communicating his demands to their client" and "that they did not withdraw their representation of Joseph R. Pecord when it became apparent that he would submit to the extortion." The Review Board further found that the unethical acts were done willfully and that participation by an attorney in an extortion warrants disbarment.

The Illinois Supreme Court approved the recommendation of the Disciplinary Commission.

Stage at Which Federal Questions were Raised

At every stage of the proceedings, from the first instant at which the question of penalty was considered, Petitioner argued vigorously that the penalty of disbarment was disproportionate to his conduct and invidious discrimination when compared to disciplinary action taken in comparable situations. Other Federal questions were raised as hereafter set forth.

ARGUMENT

FAILURE TO DISTINGUISH BETWEEN VICTIM OF EXTORTION AND PERPETRATOR OF BRIBERY DENIES ROSENTHAL PROCEDURAL DUE PROCESS OF LAW.

The findings of the Hearing Panel are consistent with Zima's Federal conviction for extortion. However, such findings are totally and incomprehensibly inconsistent with the conclusion of the Panel, Review Board, and Illinois Supreme Court that Rosenthal should be disbarred.

To avoid public criticism of attorneys involved in the passage of monies and in an overzealous effort to swing the pendulum toward more severe discipline, the Illinois Supreme Court and the commission simply failed to take cognizance of the elementary distinction between *extortion* and *bribery*, and between *perpetrator* and *victim*.

"Bribery" is a voluntary act of moral turpitude to achieve the corrupt favor of a public (or private) official; "extortion", on the other hand, is perpetrated when, under application of duress, the offender extracts payment from an unwilling victim. See *U.S.* v. *Annunzio*, 451 F. 2d 49 (1971); *U.S.* v. *Hyde*, 448 F. 2d 815 (1971). The Commission's conclusions seem to erroneously confuse the activities of Rosenthal and Carnow as participants in the bribery of Zima, ignoring the Panel's Findings of Fact, which are consistent with the uncontested evidence that they were victims of Zima's extortion (See Findings of Fact, Nos. 1, 2, 3, 4, and 6).

This confusion and inconsistency apparently led the lower Court to Sub-Silento read into the findings an "intent to bribe". This Sub-Silento usage of the "intent to

bribe", as a predicate to justify disbarment, necessarily denied Rosenthal of procedural due process of law.

Procedural due process of law is further denied in that the Complaint contained no specific or express allegation of fraud, dishonest, or corrupt motive which would be essential elements to support disbarment. There was no allegation of *intent to bribe* or to *commit a criminal act*. It alleged merely "participation in extortion" without any allegation for specific intent. (See Appendix E.)

Procedural due process of law requires that a Complaint contain fair notice of the alleged offense, *In Re: Oliver*, 333 U.S. 257, 273, 92 L. Ed. 682, 694; *In the Matter of John Ruffalo, Jr.*, 390 U.S. 544, 550. Disbarment is a punishment or penalty imposed on a lawyer, *Ex Parte Garland*, 4 Wall 333, 18 L. Ed. 366, 369; *Spevak* v. *Klein*, 385 U.S. 511. The Court held that an attorney cannot "be called upon to answer an offense specified and when the answer comes in, without any further notice or opportunity of defense or explanation, punish him for another and distinct offense." See *Ex Parte Bradley*, 7 Wall 364, p372, 19 L. Ed. 214, p217.

If Rosenthal and Carnow were accused of wrongful acts justifying disbarment, they should have known precisely what those charges were and should have been afforded a full and complete opportunity to defend with all their due process rights.

Prior to the actual hearing, the Complaint was not considered serious. The Commission told Petitioner and Carnow that it would be a friendly *suit* to establish guidelines for attorneys faced with similar dilemmas and to establish the Court's jurisdiction in matters such as this. Accordingly, Rosenthal and Carnow's choice of counsel was affected. With hindsight, they should have retained the most able and experienced trial attorney, not their

associate, less than a year out of school who had never tried a major case.

Rosenthal submits that had there been a charge of criminal intent or had he not been deceived by the Commission that his matter was to be tried as a friendly suit, he would have taken steps to offer additional evidence (See Affidavit of Rosenthal, Appendix G). If this had not been presented to Rosenthal as a friendly suit he would have challenged the Commission's jurisdiction and made preliminary motions to dismiss. In addition:

(a) Members of the Chicago Board of Zoning Appeal would have been subpoenaed for deposition and later produced at trial to establish that the extortionist did not pay them to influence their duties.

(b) Transcripts of the various administrative and legislative proceedings would be introduced into evidence, to show that the extortionist's obstructive performance before the public bodies.

(c) Officials of the FSLIC may well have been compelled to testify.

(d) Rosenthal would have probably asked for a severance from Carnow at the Hearing stage.

(e) Rosenthal, prior to Hearing, would have taken discovery depositions of John Norberg (now Judge Norberg) and various members of the law firm and associates of Pope, Ballard, Shepard & Fowle.

(f) Rosenthal, prior to Hearing, may have taken the discovery deposition of Justice William Clark, in that he was one of the attorneys who Pecord supposedly talked to about the incident in question when Rosenthal stated that he was not going to represent Pecord unless Pecord was willing to take the matter up with the Attorney General in Washington, D.C. (Note that Justice Clark took no part in the consideration or decision of this case. See Appendix C, p. 17a.)

However, the above was not material or relevant to issues framed by the Complaint, which Rosenthal believed to be drawn in accordance with the Administrator's admonition to his counsel that it was to be a *friendly suit.* (See Rosenthal's Exhibit G.) If Rosenthal was forewarned that the Administrator's attorneys were not to treat this as a *friendly suit,* but were instead to ask for *disbarment,* Rosenthal would then have filed a Motion to Dismiss on grounds of laches or staleness with its attendant due process implications. This was especially so in that many witnesses, including the client, Joseph Pecord, and the Circuit Court Judge, Walker Butler, who granted the $200,000 price reduction for the Beverly Building, at the request of the FSLIC, had died, and other critical testimony regarding the 1969 transaction was unavailable.

The Act covering disciplinary proceedings restricts judicial review of the Administrative determination to a single Court, namely, the Illinois Supreme Court. The United States Supreme Court had held that such a procedure does not deprive one of his rights so long as it affords *a reasonable opportunity to be heard and present evidence, and* does not *offend against due process. Bradley* v. *Richmond,* 227 U.S. 477, 57 L. Ed. 603, 33 S. Ct. 381; *First National Bank* v. *Weld County,* 264 U.S. 450, 68 L. Ed. 784, 44 S. Ct. 385. In that, Rosenthal was denied a reasonable opportunity to be heard and present evidence in the context of a supposedly friendly suit, it clearly offended against due process. Attorneys for the Administrator together with the Panel, the Review Board, and the Illinois Supreme Court had simply become overly zealous in their efforts to stiffen penalties against unethical lawyers and thus inadvertently breached due process.

Thus, Rosenthal was denied his rights of due process of law, and the matter should be remanded back for a

rehearing of the charges against Rosenthal or otherwise dismissed.

DISBARMENT HERE IS DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Although due process may require standards more precise than that which Canon 4 presently provides, the failure of the lower court to consider Rosenthal's interpretation of Canon 4 deprived him of his due process rights. (See Appendix F for Canon 4)

At the hearing Rosenthal stated, "I believe (in) the Canon of Ethics . . . it says that if the client has committed a crime, and there's an attorney-client relationship, you are not permitted to divulge it". (TR. 186, 204) Rosenthal further stated ". . . the clear, right thing to do was not apparent (TR 202) . . . the alternatives were all bad . . ." (TR 203). In further explanation of his interpretation of Canon 4, DR4-10(c) Rosenthal stated that, because of the possible harm which might befall his client if Zima's activties were reported to the politically oriented prosecutors, he was constrained from making such disclosure without permission from his client. Pecord refused such permission for he thought such disclosure would ultimately result in his own destruction (TR. 184, 191, 200-204)

Can Rosenthal's professional interpretation of Canon 4 under the existing circumstances be grounds for disbarment? Disclosure would have been necessary had Pecord intended to commit a crime. (See DR4-101:c(3)). Pecord, however, was not so engaged, since he was being subjected to Zima's crime, he was being extorted. Had he sought to gain his zoning through bribery, which was not the case, the entire situation would have been clearly

different. In that respect the Disciplinary Commission and the lower Court seems to be quite confused and unable to distinguish between extortion and bribery.

The lead case prohibiting disclosure of client confidences to law enforcement authorities, is *People* v. *Belge,* 83 Misc. 2d 186, 372 N.Y.S. 2d 798, aff'd 376 N.Y.S. 2d 771, wherein an attorney was charged with failing to disclose the existence of several homicide victims, and for failure to provide for the burial of a dead body. The New York Court sustained the proscriptions of Canon 4, and dismissed the action against the attorney.

In rendering his decision in *People* v. *Belge,* Judge Ormand cited to an article by Jack B. Weinstein. The Court held as follows:

> "In the most recent issue of the New York State Bar Journal (June, 1975) there is an article by Jack B. Weinstein, entitled "Educating Ethical Lawyers". Mr. Weinstein states that there are three major types of pressures facing a practicing lawyer. He uses the following language to describe these: '*First, there are those that originate in the attorney's search for his own well-being. Second, pressures arising from the attorney's obligations to his client. Third the lawyer has certain obligations to the courts, the legal system, and society in general.*" (Emphasis added).
>
> *The dimensions of a lawyer's personal morality and its conflict with the urge to choose the path most favorable to a client is raised much more urgently in confidentiality problems. The Bodies Case (People* v. *Belge, Supra.) presents the issue quite forcefully, and so does the fugitive case if one fears that the fugitive will commit crimes, especially crimes of violence, while at large. It is precisely in this area that the drafters of the Code have failed us — perhaps even more in failing to define the area where no fixed*

guides exist than in failing to give us definite solutions. The lawyer's obligations to the profession and what the Code has done, however, is to cover over the situations in which these obligations clash, either by ignoring them, or by using ambiguous language, or by giving the lawyer discretion. The result is that we are not only puzzled by particular problems, but we are also not able to be certain of the dimensions of the area of uncertainty.'" (Emphasis Added) *Problems in Professional Responsibility,* Professor Andrew I. Kaufman, Little, Brown and Co., 1976, p. 615.

Can the U.S. Supreme Court let stand the lower Court's complete disregard of this Canon 4 obligation of Rosenthal and Carnow? Canon 4, has consistently been treated as substantive law, and not as mere rhetoric. *Emile Industries* v. *Patentex, Inc.,* 478 F. 2nd 562 (2nd Cir. 1973); *Schloetter* v. *Railoc of Indiana, Inc.,* 546 F. 2nd 706 (7 Cir. 1976); *Richardson* v. *Hamilton,* 469 F. 2nd 1382 (3rd Cir. 1972).

The opinions here presented for review, notes Rosenthal, disclosed the extortion scheme to the FSLIC and states that such action is inconsistent with any claim of reliance on an obligation of silence. (Appendix C, p. 17a) The disclosures to the FSLIC, however, were made by Pecord himself (Exhibit 13), and the FSLIC reacted by reducing his purchase price in order to accommodate the payment pursuant to court order. It cannot reasonably be concluded from that episode that Pecord would have authorized disclosures which might have reached the ears of persons whose reaction would be likely to stimulate retaliation by Zima. Even if Pecord's disclosures to the FSLIC removed the matter from the category of professional confidences, the activity remained a client's "secret" under Canon 4, and its disclosure to persons other

than the FSLIC were governed by the strictures of that Canon.

The disbarment of Rosenthal is a denial of equal protection of the laws in violation of the 14th Amendment of the Constitution. Prior to this case no Court or administrative agency in modern times had penalized a victim of extortion. To disbar Rosenthal is tantamount to the ancient practice of stoning the victim of a rape.

As no other attorney has been disbarred because he failed to withdraw his representation of a victim of extortion, the disbarment of Rosenthal for such representation denies him the equal protection of the law. All attorneys are required to follow the mandates of Canon 4 of the Code of professional responsibility. Is it not then a denial of Rosenthal's equal protection of the law rights if he is disbarred because of his adherence to Canon 4? Rosenthal's testimony was uncontroverted that it was common knowledge among active Cook County, Illinois lawyers in 1969 that the U.S. Attorney's and State's Attorney's office and other governmental authorities in Cook County had not taken action against corrupt zoning officials for several decades. For example, Ralph Metcalfe (the former Zoning Chairman and former Congressman) admittedly stated that he "could smell money passing underneath the table . . ." (Tr. 200.) It is clearly a denial of equal protection of the law to disbar Rosenthal and Carnow where no one else has been penalized under similar circumstances.

DISBARMENT VIOLATES DUE PROCESS WHEN BASED UPON THE UNCLEAR, VAGUE, AND INDEFINITE STANDARDS.

The Illinois Supreme Court held that Rosenthal be disciplined because of ". . . conduct, in facilitating and par-

ticipating in the paying of money to Zima . . .'' as well as Rosenthal's failure to disclose the criminal activity ''. . . to individuals in a position to take direct action.'' (See pp. 9a, 17a of opinion Appendix C)

The nature of the charges against Rosenthal filed by the commission were vague and indefinite. (See Appendix E) In general terms it provided:

> '' (a) concealed or knowingly failed to disclose or come forward with information about the existence and commission of criminal activity;
>
> (b) counseled and knowingly assisted and participated in conduct which resulted in the furtherance of a crime;
>
> (c) engaged in conduct that is prejudicial to the administration of justice and that adversely reflects on his fitness to practice law;
>
> (d) engaged in conduct involving the appearance of impropriety.''

Both the complaint and the lower Court's opinion failed to distinguish between *bribery* and *extortion* and the *perpetrator* and the *victim*. They ignored the obvious, and treated extortion and bribery as one. With disregard for the basic tenet that one is innocent until proven guilty, the lower Court cites with approval, the criminal bribery case of *U.S.* v. *Kahn* for the proposition that the extortion victim must ''. . . negate criminal intent or willfullness.'' (see Appendix C, p. 16a).

The Illinois Supreme court's opinion failed to supply any guidelines for an attorney such as Rosenthal who is faced with the dilemma of representing a victim of extortion who refuses to allow his attorney to go to the authorities because of the extortionist's threats. It further did not give weight to the duress under which Rosenthal

was forced to make his decisions which involved threats against his family, his client, his associates and their respective families. (Tr. 54-56, 96-97, 200-201, 374-375)

All the charges in the complaint as well as the lower Court's admonition that Rosenthal failed to dislose ''. . . the criminal activity to individuals in a position to take direct action . . .'' by themselves lack the precision required for administrative application where it involves a *victim* rather than a *perpetrator*. Precisely, who in 1969 was in a position to take direct action? The administrator inferred that Rosenthal and Carnow should have notified the Illinois Bureau of Investigation. (Tr. 108) However, the Illinois Bureau of Investigation was nonexistent in 1969, having first been created in 1970. Possibly attorneys facing such a dilemma should now seek guidance from the Illinois Attorney Registration and Disciplinary Commission. This well may be the answer *now,* but in the year *1969*, the Commission was not in existence, being first created in 1973. The Illinois Attorney General's office was considered, but they did not have jurisdiction. (Tr. 100.) Other local authorities in 1969 Cook County, Illinois were political cronies and friends of the extortionist and Pecord and his attorneys justifiably feared that such disclosures would bring harm to Pecord, his attorneys and their families. (Tr. 200-201)

Is it fair to discipline Rosenthal and Carnow when the acts of the accused involved terms and parties which lack concrete definition and application? "Individuals in a position to take direct action'' may mean one authority under one set of facts and another under another set of facts. This phrase may have one meaning to one party and another meaning to another. It may have meant one thing in 1969 and another in 1978. The FSLIC may have been the proper party in the year 1969 and the local U.S. At-

torney may be the proper party in the year 1978. The charges in the complaint and "individuals in a position to take direct action" simply are not self-defining words or phrases. They are not clear and definite. It leaves the administrator and the Illinois Supreme Court in the year 1978 to use their own 1978 moral standards with the benefit of hindsight to formulate and apply its judgment to a 1969 incident.

The Illinois Supreme Court by its opinion has not cured the vagueness of the complaint. The Court merely notes that it considered Rosenthal's ". . . contention that, as an attorney, he was duty bound not to abandon his client in a time of need and was obliged to avoid actions which would, potentially, cause his client harm." (See Appendix C, p. 17a.) It was not clear, however, if Rosenthal was mandated to abandon his client. It makes reference to Rosenthal's "attorney-client confidentiality requirement", but it gives no guidelines as to when Canon 4 should be followed and when ignored.

In view of the vague and indefinite charges of the complaint, Rosenthal's interpretation of Canon 4 should be considered in the context of his advocacy of procuring an extension of the closing date from the FSLIC on Pecord's contract so that relief could be obtained through the Courts after exhaustion of administrative remedies, or in the alternative, seek the assistance of the U.S. Attorney General in Washington, D.C.

For example, Rosenthal stated:

> "I wanted to get an extension. I wanted to go through the courts."
> ". . . through the administrative review, go through the appeals. I wanted to convince him that what some people talk about openly in the streets of the City of Chicago could be changed, and that is why I had refused to even consider the possibility of paying anything to anybody on the June 20th hearing, and when other suggestions were made to me, I had declined." (Cr. 290-295)[1]

Also, see Gordon's abstract, pages *87 and 88* where Gordon stated:

> "I did have occasion to meet Ben Rosenthal and Joe Pecord in the period of July and August, 1969. Only Pecord and Rosenthal were present.
> "At that time, Pecord was very, very distressed that he was being extorted for monies for zoning. He wanted Rosenthal to implement the zoning however he could. There was a discussion that there would be other counsel involved. Rosenthal indicated to Pecord that he should go to FSLIC or some other government agency and get an extension of time. Rosenthal said *he did not agree that the passing of money was a way to do it;* that Pecord was insisting that he had no time; and that time had run out; and that he, Rosenthal, was not the one to handle the situation on that basis. So there was much arguing back and forth. Rosenthal, at that meeting offered to go to

[1] The lower Court's confusion is emphasized when the court in its statement of facts erroneously quoted Rosenthal as telling Carnow, "If (Zima) can help us and if he can keep it down to $20,000 or less and we get the rezoning and our client doesn't have to pay any additional monies unless we get rezoning, let's go ahead, but we have got to act fast. Otherwise he loses everything." The court's quotation taken out of context was merely Rosenthal telling Carnow what Pecord had previously told Rosenthal—it was not the words or sentiments of Rosenthal *at any time.* See Tr. 199, Cr. 291-293, also see Tr. 92-93, Tr. 193-200, 103-104.
A careful reading of the transcript shows in many places that Rosenthal never advocated such a procedure. Rosenthal clearly stated at Tr. 199, "I did not counsel Joe Pecord to pay monies for the assurances of the desired zoning for the use of the Beverly Building *at any time* during the year 1969."

Washington with Pecord to see if he could implement a kind of extension with FSLIC. Rosenthal suggested strongly that they go into the courts and bring this thing out into the open and that was the only way he could handle it. Pecord indicated that he knew these people, he had dealt with them before, and that it was a personal animosity between him and (John) Daley. Pecord said he just knew that this thing was going to die, that it was not going to get extended, and that he had explored that to the best of his ability." (Emphasis added)

Disbarment violates due process as being based upon unclear, vague and indefinite standards—this is especially so here where Rosenthal always expressed his opposition to his client meeting the demands of the extortionist and wanted FSLIC to grant an extension so that Pecord could go through the courts.

THE DISTRICT COURT ORDER OF MARCH, 1973, EXTENDING IMMUNITY TO ROSENTHAL UNDER 180 U.S.C. 2418 IS VALID AND BINDING UPON THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION.

The District Court order of March, 1973, extending immunity to Rosenthal under 18 USC 2418 is valid and binding upon the attorney Registration and Disciplinary Commission[2]; such results are required by the proper application of:

[2] Rosenthal's grant of Transactional Immunity came on March 15, 1973 and was granted under 18 USC 2418, which remained effective to October 1, 1974. The Hearing Panel felt bound to follow the decision of *In Re: John M. Daley,* 549 F.2d 469, a use immunity case. This finding was in error and the Complaint against Rosenthal should have been dismissed by the Illinois Supreme Court.

(a) The Writs Act, 28 U.S.C. § 1651,
(b) The Court's inherent common law power,
(c) The Supremacy Clause of Article VI of the United States Constitution.

The interests of justice and the concern of the United States Attorney to preserve the integrity of testimony obtained in connection with criminal investigations mandates such adherence by the Commission.

No guilt should be implied in Rosenthal's request for immunity.

Thus, the lower Court's opinion should be reversed.

In determining how grants of immunity effect attorney disciplinary proceedings, various Courts have stated that it is necessary to look to the jurisdiction of the Court having granted the Immunity Order and to the language of the Order itself. Here, Rosenthal's Federal Immunity Order provides as follows:

"IT IS FURTHER ORDERED THAT (Rosenthal) shall not be prosecuted or subjected to *any penalty* or *forfeiture* pertaining to *any transaction, matter,* or thing which he is compelled to testify to by terms of this order, and that his testimony may not be used as evidence at any criminal proceeding against him in any Court." (Emphasis added.)

Federal law including but not limited to the Supremacy of the Law Clause of Article VI of the United States Constitution, the Fifth Amendment to the United States Constitution and the Inherent Federal Common Law Jurisdiction of the United States District Court, as well as applicable Statutes, provide ample basis for reversing the judgment of disbarment.

This is not a case of an attorney who seeks to shield himself from professional sanctions after having engaged in a course of criminal conduct. The suggestion of the Complaint that Rosenthal participated in a crime is analogous to the suggestion that there is always complicity between the victims of a crime and their assailants. The administrator argued that "because there was the payment of extortion money, it necessarily follows that Petitioner participated in a crime."

This fallacious suggestion is bootstraped by the implication that "because Rosenthal and Carnow were granted immunity, it necessarily follows that they engaged in criminal conduct." Here again, an illogical fallacy is used to compound an illogical intermediate premise. Hence, it is necessary to examine the reasons established at trial why Rosenthal and Carnow were granted immunity.

This is not a case where there has been a lack of frankness on the part of the Petitioner.[3]

The Administrator speciously argued that Rosenthal and Carnow's request for immunity in the Zima investigation is somehow incompatible with their role as "victims". To infer guilt from the assertion of a Constitutional right is to destroy the Constitution itself, and we attorneys should be the first to stand up for its preservation. It is historically recognized that one of the basic functions of the Fifth Amendment privilege is the protection of *innocent* men. *Grunewald* v. *U.S.*, 353, U.S. 391 (1957).

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[3] Refer to Petitioner's Exhibit No. 7 in which Assistant United State's Attorney Steven J. Kadison stated in part in his letter dated August 7, 1975, to the Administrator ". . . Mr. Rosenthal was truthful at all times with agents of the government, and likewise was readily available to assist us during our preparation for trial."

To answer the Administrator's rhetorical inquiry, there exists in the record the testimony of the attorney Joseph Lamendella, who advised them to seek immunity (Tr. 279):

> "Don had expressed a concern that for many reasons there may be either through vindictiveness or for some other reason a state prosecution and also as a matter of caution I advised both he and Mr. Rosenthal to secure immunity . . ."

Lamendella testified that seeking immunity was one of the best ways to get the attention of the Justice Department to secure witness protection, which Carnow felt he needed in light of Zima's threats.

Lamendella testified that his clients were in fact *victims* of the crime of extortion and were not guilty of any crime, (Tr. 283). His recommendation that they secure immunity from the government, therefore, had nothing to do with any fear of their guilt or question of their innocence.

Additionally, this is not a case where Rosenthal should be selectively disciplined because it is the popular myth of the public that all immunity witnesses are per se wrongdoers.

The Attorney Disciplinary proceedings are quasi-criminal in nature and hence the language of the Immunity orders that they "shall not be . . . subject to any penalty or forfeiture pertaining to any transaction, matter, or thing which (they are) compelled to testify . . .," bars the imposition of sanctions herein. Clearly, any sanction ought necessarily to be deemed a penalty or forfeiture from which Rosenthal is protected.

Indeed, in *Spevak* v. *Klein,* 385 U.S. 511 (1967), Mr. Justice Douglass speaking for a plurality of the United States Supreme Court held that an attorney may not be

disbarred for exercising his privilege against self-incrimination in a disciplinary proceeding. The Court further stated that, for purposes of the Fifth Amendment privilege " 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction. Mr. Justice Fortas joined the plurality in expressly rejecting the contention that the attorney's special responsibilities necessitated the imposition of certain limitation on the privilege of self-incrimination.

The view of *Spevak* was adopted six years earlier by Mr. Justice Black in his dissent in *Cohen* v. *Hurley,* 366 U.S. 117 (1961). Mr. Justice Black's view gives weight to the notion that it is particularly important that attorneys, precisely because of their public role, retain their constitutional rights and safeguards:

> "The important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyranical exertion of governmental powers. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as grave as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment." 366 U.S. at 138.

An attorney's reliance on the protection of the Constitution, or that granted to him in lieu of his Fifth Amendment Rights, or immunity therefrom should not be viewed as inconsistent with his role as an officer of the Court.

In Re: Ruffalo, 390 U.S. 544 (1968), the United States Supreme Court stated that "disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." 390 U.S. at 550. As a result, it found that disciplinary proceedings are "adversary proceedings of a quasi-criminal nature" so that adequate notice of the charges that might be presented must be given before the proceedings begin, and the charges cannot be amended later on the basis of the attorney's testimony. 390 U.S. at 551. The Court did not define the term "quasi-criminal," nor did it specify other requirements that may be imposed as a result of this characterization. In referring to the proceedings as "quasi-criminal," however, the Court did cite—by the use of "Cf."—the case of *In re Gault.* 390 U.S. at 551 citing 387 U.S. 1, 33 (1967). Accordingly, this establishes that the United States Supreme Court considers that the approach adopted in juvenile cases is appropriate to disciplinary proceedings.

No doubt opposing counsel may cite other cases where the United States Supreme Court did not accept certiorari from disciplined attorneys granted immunity. All such cases are distinguishable in that they involved attorneys who were either convicted of criminal acts or admitted commission of criminal acts. Here Rosenthal and Carnow were *victims* rather than *perpetrators.* In all other cases, the attorneys had a criminal intent, and corrupt motives, while here Rosenthal and Carnow had none. Additionally, most, if not all the other cases involved *use* immunity, while here Rosenthal and Carnow were granted *transactional* immunity. (See 18 USC 2418)

Public interest demands greater cooperation between attorneys and prosecutional authorities rather than facing the obvious implications that could result if this important precedent is not set aside.

THE DISBARMENT OF ROSENTHAL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF AMENDMENT 8 OF THE UNITED STATES CONSTITUTION.

The Illinois Supreme Court has consistently held that disciplinary proceedings and disbarment are punishment. See *In Re*: *Damisch,* 38 Ill.2d 195, 230 N.E.2d 254, 261-62 (1967) ("punishment . . . imposed . . . is censure"); *In Re*: *Shavin,* 40 Ill.2d 254, 239 N.E.2d 790 (1968) ("Sole question presented . . . is the extent of the punishment to be imposed"); *In Re*: *Sullivan,* 33 Ill.2d 548, 213 N.E.2d 257, 260 (1966) ("this court has final responsibility for determining the punishment to be imposed . . ."); *People* v. *McCaskrin,* 325 Ill. 149, 163 (1927) ("The punishment to be inflicted by disbarment of an attorney is the destruction of his professional life."), *In Re*: *Hallman,* 384 Ill. 325, 332 (1943)

In addition, an attorney's practice represents a substantial investment of time, money, and energy. Justice Black noted:

> "The lawyer's abilities, acquired through long and expensive education, and the good will attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer. . . .
> These assets should be no more subject to confiscation than his home or any other asset he may have acquired by his industry and initiative. *Cohen* v. *Hurley,* 366 U.S. 117, 146 (1960) (Black, J. dissenting).

Here, Rosenthal has not been convicted or indicted of any crime, nor has he admitted to any crime. He merely represented his client, Joseph Pecord, who was a victim of extortion, and testified in behalf of the Government in

order to bring about the incarceration of a corrupt zoning official. If he was wrong it was an error of judgment. Certainly disbarment, which is the loss of his professional life and reputation carries with it the stigma that will harm him in his community and confiscates assets that he has earned through industry and initiative.

Such proceedings have been characterized by the United States Supreme Court as of a "quasi-criminal nature" *In Re: Ruffalo,* 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed. 2d 117 (1968). Since disbarment as punishment never before has been inflicted on an attorney who represented a victim of extortion, it certainly is *unusual.* As it is the equivalent to professional capital punishment it certainly is *cruel.* Under the circumstances here it is clearly cruel and unusual punishment in violation of Amendment 8 of the United States Constitution.

The sanction is unreasonable when contrasted with the judgment entered in other cases. For example, we cite:

(a) *In re Bourgeois,* 25 Ill. 2d 47 (1962); suspension, possibly subject to extension, for embezzlement of client's funds.

(b) *In re Kayne,* 53 Ill. 2d 410 (1973), one-year suspension for illegal payment to U.S. Internal Revenue Agent for purpose of influencing official actions.

(c) *In re Howard,* 64 Ill. 2d 343 (1978): two-year suspension for twice bribing a policeman to influence his testimony; for stating that other payments would be made to influence the prosecutor and the judge in the case in which the lawyer was appearing; and for lying before the review board.

(d) *In re Leonard,* 64 Ill. 2d 398 (1976); three-year suspension for aiding and abetting bribery, falsifying records and participation, resulting in criminal conviction, in corruption involving the office of the Secretary of State.

(e) *In re Tuttle,* 371 Ill. 153 (1939): a two-year suspension for bribery of the head of the State Tax Commission over a protracted period.

(f) *In re Huff,* 371 Ill. 198 (1939): two-year suspension for protracted course of bribery of the Chairman of the State Tax Commission.

(g) *In re Kein,* 69 Ill. 2d 355 (1978), an effective 12 month suspension for bribing police officer to give favorable testimony in a criminal case.

(h) *In re Sherre,* 68 Ill. 2d 56 (1977): a three-year suspension after Federal conviction of four counts of mail fraud benefitting attorneys more than Sixteen Thousand ($16,000.00) Dollars; and for lying before Hearing Panel.

(i) *In re Cook,* 67 Ill. 2d 26 (1977). (See also, *State* v. *Cook,* 194 Neb. 364, 232 N.W. 120); an effective 16 month suspension for gravest misconduct at highest level.

There is one common factor to each of these (and numerous other) instances of milder penalties than Petitioner's resulting from graver misconduct than that of Petitioner: none of the respondents in those other cases had generated a federal wave to rock the State boat. None of them involved a respondent who had disclosed State corruption to federal officials.

Clearly, the disbarment of Rosenthal constitutes cruel and unusual punishment in violation of Amendment 8 of the United States Constitution.

CONCLUSION

"A man who has himself for a lawyer has a fool for a client."

It is difficult to discern wherein I was more foolish; when I respected and believed in the Lawyers' Code of Ethics and could not deafen myself to Canon 4 and the pleas of my client; when I looked in vain to the FSLIC, a government agency, to assist in overcoming the extortionist's demands and threat; when I agreed to testify for the United States in federal criminal proceedings, convinced that only thereby could the government win its case against the politicians who sometimes controlled the Chicago Zoning by bribery and extortion; or when I foolishly listened to the plea of the Administrator of the Disciplinary Commission that I should not fight its jurisdiction in its effort to clean house of the "big guys" convicted by the courts of bribery with this being a "friendly suit" to help set precedent.

To all of the above, I plead guilty. But fortunately even a fool is entitled to due process of law, and it is for this reason I address the United States Supreme Court; hopeful that the greatest jurists in the land will uphold the law of the land, and allow this fool his day in court.

APPROPRIATE RELIEF

Petitioner believes that the questions raised herein, particularly those concerning conflicts between Canon 4 and the Constitution's equal protection and due process safeguards, are of substantial import to the organized Bar and the general public.

Petitioner prays that his Petition for Writ of Certiorari be granted and that the judgment below be vacated and the cause remanded for such proceedings as may be necessary.

Respectfully submitted,

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APPENDIX A

BEFORE THE HEARING BOARD
OF THE
ATTORNEY DISCIPLINARY SYSTEM
UNDER ILLINOIS SUPREME
COURT RULES 751-770

In the Matter of:

DONALD S. CARNOW,

Attorney-Respondent,

No. 76-CH-36

and

BENJAMIN JULIAN ROSENTHAL,

Attorney-Respondent.

No. 76-CH-37

REPORT OF THE HEARING PANEL
ALLEGATIONS OF THE COMPLAINT

1. Donald S. Carnow was licensed to practice law in Illinois on November 29, 1967 and is still so licensed. Benjamin Julian Rosenthal was licensed to practice law in Illinois on November 17, 1952 and is still so licensed.

2. Respondent Rosenthal employed Respondent Carnow as an associate attorney from 1969 until March of 1971 when Respondent Carnow was admitted into Respondent Rosenthal's partnership. Respondents continued to practice in partnership. The Respondents respresented Joseph R. Pecord in connection with the purchase and rezoning of a property known as the Beverly Savings and Loan Building, 8001 South Western Avenue, Chicago, Illinois.

3. Pecord had planned to convert the Beverly building into a nursing home and in January, 1969 entered into a contract with the Federal Savings and Loan Insurance

Corporation to purchase the building. Pecord had invested considerable sums of money in the Beverly building and the contract further provided for forfeiture of a $50,000.00 down payment should he not perform. The building could not be used as a nursing home at that time because it was not zoned for that purpose.

4. The Respondents undertook to change the zoning of the Beverly building so that it could be used as a nursing home. On May 13, 1969 they filed a petition with the Chicago City Council seeking a zoning amendment. That petition was referred to the Committee on Building and Zoning of the Chicago City Council which scheduled a public hearing on the petition for June 20, 1969.

5. On or about June 18, 1969, Stanley Zima, who was then Secretary to the Committee on Building and Zoning met with the Respondents and told them that their petition would be denied. Zima further told Respondents that there was then pending before the City Council an ordinance which would permit the Board of Zoning Appeals to grant the zoning change. Zima also told Respondents that with his help a zoning variance could be obtained but that his help would cost between $20,000.00 to $30,000.00.

6. The public hearings by the Committee on Building and Zoning were held as scheduled on June 20. The Committee made no recommendation, which in fact defeated the petition. The City Council passed the ordinance about which Zima had informed the Respondents, thus allowing the Board of Zoning Appeals to grant zoning variances.

7. The Respondents decided to use the new variance procedure and agreed to make the payment that Stanley Zima stated would be required. Zima was told this during the last week of July, 1969.

8. Zima on or about September 3, 1969 gave Respondents instructions as to how the $20,000.00 payment was to be made to Zima. The actual instructions were given to Respondent Carnow but the Respondent Rosenthal was fully informed of them. The instructions in their essential part were that Pecord should place $20,000.00 in cash in

an envelope, write his name across the flap and turn the envelope over to Respondent Carnow who would take the envelope containing the $20,000.00 to the lobby of the American National Bank where he would give it to the waiting Zima.

9. The instructions were followed except that Zima did not appear on September 4, 1969 but did appear at Respondents' office the next day, at which time he received the envelope containing the $20,000.00 from the Respondents.

ANSWER

The essential elements of the Complaint as stated above have been admitted by the Respondents. Their answers contain substantial additional affirmative information and defenses which will be discussed in part hereafter.

FINDING OF FACT

1. There is no question but that the Respondents were retained by Pecord for a lawful legal purpose, i.e. to obtain a zoning variance. Further, there is no question that Pecord's intentions were honorable and his desire to convert the Beverly building to a nursing home was a laudable thing.

2. Had the Respondents failed to obtain the zoning variance their client, Pecord, would have lost considerable sums of money. It was, therefore, of great importance that the Respondents succeed.

3. Based on the record before us, we find that Pecord was entitled to the zoning variance he requested but that the variance was denied him because of political implications brought forward by the Ward Committeeman.

4. Stanley Zima, then the Secretary to the Committee of Building and Zoning was in a position to see to it that Pecord's request for a variance was either granted or denied. Zima demanded $20,000.00 for this "assistance" which meant that unless the extortion money was paid, no variance would be granted.

5. Respondents maintain that they counseled their client against paying the money to Zima. The Hearing Panel finds this immaterial since the money was paid and the Respondents played an active role in paying it.

6. Respondents maintain and it is probably believable that they and their families were threatened by Zima with economic and bodily harm and that their client was threatened.

7. Twenty Thousand Dollars ($20,000.00) in cash was placed in an envelope, across the seated flap of which Pecord wrote his name. This envelope was delivered by Respondents to Stanley Zima in payment for the favorable zoning variance they had obtained.

8. About three years later the Internal Revenue Ser vice commenced an investigation of Pecord's finances and as a result of which Respondent Carnow met with two agents of the Internal Revenue Service and was questioned by them regarding the $20,000.00 payment to Zima. Carnow evaded telling the agents the truth.

9. In September, 1972 Respondent Carnow told his attorney that the $20,000.00 payment was made to a deceased Horace Gardner. This information was communicated by Respondent's attorney to the federal agents. Respondent Carnow confessed his misrepresentation to the federal agents.

10. Respondents cooperated with the federal investigation and with the United States Attorney in obtaining an indictment of Stanley Zima and as witnesses during the trial which resulted in the conviction of Zima for extortion.

11. Respondent's cooperation with the federal authorities before the Grand Jury and at trial was under a grant of immunity.

CONCLUSIONS OF FACT AND LAW

1. The Respondents, by their failure to come forward and notify the proper authorities knowingly concealed and failed to disclose the existence of criminal activity.

2. The Respondents knowingly counseled, assisted and participated in conduct which resulted in the furtherance of the crime of extortion.

3. The Respondents knowingly engaged in conduct prejudicial to the administration of justice and their conduct adversely reflected on their fitness to practice law.

4. The Respondents engaged in conduct involving the appearance of impropriety.

5. The above described conduct of the Respondents was unethical and unprofessional and brought the legal profession into disrepute.

6. Two members of the Hearing Panel concluded as a matter of law that the grant of immunity to the Respondents barred the Administrator from proceeding against Respondents before the Attorney Disciplinary System. However, the decision of the United States Court of Appeals for the Seventh Circuit in In Re John M. Daley 76-1657 decided February 11, 1977 held that the grant of immunity by a Federal Court did not bar the Administrator from so proceeding. The Hearing Panel is bound by this decision.

7. Respondents must be disciplined.

RECOMMENDATION

The members of the Hearing Panel, therefore, recommend that the Respondents Donald S. Carnow and Benjamin Julian Rosenthal be disbarred.

/s/ .....
Chairman of the Hearing Board
Pane 1 Cook County

Approved:

/s/ .....

/s/ .....

/s/ Lawrence L. Kotin

Being all of the Members of the Panel

APPENDIX B

BEFORE THE REVIEW BOARD
OF THE
IILINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:

DONALD S. CARNOW,

Attorney-Respondent,

No. 76-CH-36

and

BENJAMIN JULIAN ROSENTHAL,

Attorney-Respondent.

No. 76-CH-37

REPORT AND RECOMMENDATION
OF THE REVIEW BOARD

This matter comes before the Review Board on a recommendation of the Hearing Board that Donald S. Carnow and Benjamin Julian Rosenthal, Respondents, be disbarred.

Exceptions filed on behalf of the Respondents take issue with the Hearing Panel's finding that "Respondents knowingly counseled, assisted and participated in conduct which resulted in the crime of extortion. . ." This contention is without merit. The evidence is clear and convincing that the attorneys "maintained contact with the extortionist (Tr. 32-35); that they freely aided the extortionist by communicating his demands to their client (Tr. 90, 93, 180, 62); "and that they did not withdraw their

representation of Joseph R. Pecord when it became apparent that he would submit to the extortion.

Respondent Donald S. Carnow admits in his amended Exceptions that "By and large Respondent agrees with the conclusions that certain apparent unethical casts were done with his knowledge." However, he contends they were not performed willfully. This position is unsupported by the evidence.

The Board has reviewed and evaluated the record below and finds that it evidences a full, fair and complete hearing on all the issues presented.

There is is ample evidence to support the findings of the Hearing Panel and therefore the Board affirms its findings.

Participation by an attorney in an extortion is an offense which warrants disbarment; in the absence of any redeeming conduct on the part of Carnow and Rosenthal there is not a basis for a modification of the penalty recommended by the Panel.

It is the unanimous recommendation of the Review Board that Donald S. Carnow and Benjamin Julian Rosenthal be disbarred.

Respectfully submitted,

Martin L. Silverman, Chairman
Donald A. Morgan
Chester L. Blair
Robert P. Cummins
Thomas D. Nyhan
John T. Perry
Marshall A. Susler
C. William Fechtig
Members, Review Board

APPENDIX C

OPINION

SUPREME COURT

OF ILLINOIS

United States of America

State of Illinois)
Supreme Court) ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of September in the year of our Lord, one thousand nine hundred and seventy-eight, within and for the State of Illinois.

Present: DANIEL P. WARD, *Chief Justice*
Justice ROBERT C. UNDERWOOD
Justice HOWARD C. RYAN
Justice THOMAS J. MORAN
Justice JOSEPH H. GOLDENHERSH
Justice WILLIAM G. CLARK
Justice THOMAS E. KLUCZYNSKI
WILLIAM J. SCOTT, *Attorney General*
LOUIE F. DEAN, *Marshal*
Attest: CLELL L. WOODS, *Clerk*

Be It Remembered, that afterwards, to-wit, on the 6th day of October, 1978 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

In re: No. 50098 DONALD S. CARNOW and BENJAMIN JULIAN ROSENTHAL, *Attorneys*	}	Disciplinary Commission

CLELL L. WOODS
Clerk of the Supreme Court
State of Illinois

Docket No. 50098—Agenda 8—May 1978.
In re BENJAMIN JULIAN ROSENTHAL *et al.*, Attorneys, Respondents.

Mr. JUSTICE MORAN delivered the opinion of the court:

This disciplinary proceeding comes before us on exceptions to the report and recommendation of the Review Board of the Attorney Registration and Disciplinary Commission, which approved the hearing panel's recommendation that respondents, Benjamin J. Rosenthal and Donald S. Carnow, be disbarred. That recommendation resulted from a complaint filed by the Administrator of the Commission against the respondents charging them with unethical conduct by their participation in and facilitation of an extortion scheme perpetrated against their client by a public official. The complaint charged that the respondents had concealed or knowingly failed to disclose the existence of criminal activity; counseled and knowingly participated in activities in furtherance of the crime; engaged in conduct that was prejudicial to the administration of justice and which adversely reflected on their fitness to practice law; and engaged in conduct which had the appearance of impropriety. Respondent Carnow was additionally charged with making false and misleading statements to Federal investigating agents.

In 1969, Rosenthal represented Joseph R. Pecord in matters concerning the purchase and use of a bank building, located in the city of Chicago and owned by the Federal Savings and Loan Insurance Corporation (FSLIC), which building Pecord intended to convert into a nursing home. Because the property was not zoned for such use, a zoning variance had to be obtained. The purchase contract, which had a closing date of July 1, 1969, was not contingent upon Pecord's success in securing rezoning. Failure to complete the contract would result in Pecord's forfeiture of his $50,000 down payment and other preparatory expenditures incurred by him.

In 1969, Carnow, a 26-year-old, full-time assistant Attorney General, was serving Rosenthal as a part-time

associate on a space-for-service basis. In April of that year, Carnow, on Rosenthal's behalf, visited the office of the city council's Committee on Building and Zoning (Committee) and acquired information concerning procedures for seeking rezoning and obtaining an early hearing date. While at the Committee's office, Carnow met Stanley Zima, the secretary of the Committee. Carnow, who had been formerly acquainted with Zima, explained the nursing home project to him. Before Carnow left, Zima offered to assist him and Rosenthal in drafting their petition. Respondents accepted Zima's assistance. A petition was thereafter filed and a hearing date was set for June 20, 1969.

On or about June 17, 1969, Carnow received a call from Zima. Zima told Carnow that their petition was doomed because the ward committeeman and several neighborhood residents were opposed to the rezoning. Zima offered to help but told Carnow it would cost their client some money.

Carnow related this information to Rosenthal, and respondents arranged a meeting with Zima for the following day. At the meeting, Zima repeated to Rosenthal that which he had previously told Carnow. Zima informed the respondents of a zoning ordinance which was pending before the city council, and said that, if passed, the ordinance would permit respondents to bypass the Committee and file directly with the zoning board of appeals. Zima indicated that, to assure the ordinance's passage, he would have to undertake, on Pecord's behalf, "multiple obligations" of $20,000 to $30,000. Pecord could pay the money either as a political contribution or as attorney fees. Respondents rejected Zima's suggestion and indicated that they would proceed to the Committee's hearing on the merits of their case.

On June 20, 1969, several citizens and a ward committeeman appeared at the hearing and objected to Pecord's petition. The Committee deferred action on the petition and thereby deprived respondents of a final order from which they could appeal. (The petition was ultimately denied.)

Rosenthal met with Pecord after the hearing and informed him that he, Rosenthal, had been forewarned that objectors would be at the hearing. Rosenthal did not tell Pecord of the conversation with Zima, but did discuss the possibility of pursuing the zoning board of appeals route should the city council pass the pending ordinance. Rosenthal suggested to Pecord that they contact FSLIC officials for an extension.

Several days after the hearing, Zima contacted Carnow and told Carnow that the zoning ordinance had passed. Carnow related this information to Rosenthal, who expressed his enthusiasm at the prospects of obtaining the needed zoning variance on its merits. Rosenthal filed his zoning petition with the administrator of the zoning board of appeals and, at Pecord's request, dictated a letter to the FSLIC requesting an extension. A limited extension was obtained.

In a series of phone calls during the next few weeks, Zima informed Carnow, in substance, that Pecord would never get his rezoning unless Pecord accepted Zima's assistance. Zima stated that he would supply Pecord with "special zoning counsel" who would accept Pecord's pay-payment as "attorney fees." Carnow related these conversations to Rosenthal, and Rosenthal, for the first time, informed Pecord of Zima's demand.

During the interim, the zoning board of appeals administrator recommended that Pecord's petition be denied.

Efforts toward obtaining further extensions on the contract with FSLIC failed. During the final weeks of July, Rosenthal and Pecord discussed Zima's offer. Rosenthal, according to his testimony at the disciplinary hearing, counseled Pecord against agreeing to Zima's demands and encouraged Pecord to seek further extensions to afford them time to seek review in the courts, if necessary. Rosenthal advised Pecord that if Pecord agreed to Zima's proposal, he, Rosenthal, would have to withdraw from the case. (Thomas Gordon, an acquaintance of Pecord's, was present during this conversation and corroborated Rosen-

thal's testimony.) Pecord, however, decided to accept Zima's offer of "assistance" in return for the promised zoning.

Rosenthal did not withdraw but, instead, instructed Carnow to inform Zima of Pecord's decision. (Rosenthal specifically told Carnow that "If [Zima] can help us and if he can keep it down to $20,000 or less and we get the rezoning and our client doesn't have to pay any additional monies unless we get rezoning, let's go ahead, but we have got to act fast. Otherwise he loses everything.") Carnow informed Zima of Pecord's decision. As instructed, the respondents filed a petition to have the zoning board of appeals review their administrator's adverse recommendation. A hearing date was set for August 26, 1969.

Thereafter, Rosenthal and Carnow discussed withdrawing from the case, and they agreed that, unless Zima provided Pecord with "special zoning counsel" as promised, they would withdraw. Rosenthal instructed Carnow to arrange for Zima to meet with them to inform them of the identity of the special counsel. On August 15, 1969, the three met. Zima informed the respondents that there would be no special counsel and that his "obligations" were now theirs. Rosenthal objected and indicated he would go to Federal authorities, to which Zima responded that if Rosenthal did so, he and Carnow would never again practice law in the city of Chicago.

The respondents did not withdraw, and, on or about August 26, 1969, the zoning board of appeals approved Pecord's petition for rezoning. No objectors appeared at the hearing before the zoning board of appeals. Thereafter, Zima demanded payment. Before making payment, respondents required Zima to provide them with proof of the zoning board's decision. Zima did so; the money was obtained, and the payment was made in Rosenthal's law office.

In 1972, Federal agents, pursuant to a lead, discovered several of Pecord's checks which were marked "rezoning." Carnow learned of the investigation through Rosenthal and contacted two Federal agents to arrange for a meeting. Before that meeting could take place, Carnow, while at city hall, happened by chance to see Zima. Zima instructed Carnow to tell the agents that the money had been paid to a person who had since died. He threatened Carnow and Rosenthal with physical harm if they did not do as they were told. On the day prior to Carnow's meeting with Federal agents, Carnow's auto was set afire. (It was later learned that several such fires had occurred in Carnow's neighborhood during the previous weeks.)

When Carnow met with the agents, he told them he knew nothing about a payoff and stated that he had had very little to do with the Pecord rezoning.

After that meeting, Carnow retained private counsel. Both Carnow and Rosenthal obtained immunity from prosecution in exchange for their testimony against Zima. Zima was convicted in the Federal district court of extortion and income tax evasion.

At the hearing before the hearing panel, several reasons for the failure to withdraw or disclose the criminal activity were offered by Carnow, *e.g.*, deference to Rosenthal's judgment, fear for his own safety, and possible economic repercussions from within city hall. Carnow stated that he had heard of acts of violence within Zima's ward, acts allegedly fostered or encouraged by Zima, and believed that Zima was capable of carrying through with his threats. He stated that, during the summer of 1972, he and Rosenthal had a disagreement over whether they should come forward with information regarding the extortion, but that Rosenthal had indicated he would consider any such disclosure a breach of their attorney-client relationship. Carnow admitted that he had not been forthright with the agents, but contended that, during the summer of 1972, he was under a great deal of stress. The latter statement was corroborated, to some extent, by Carnow's psychologist.

A number of witnesses appeared on Carnow's behalf and testified to his reputation for honesty, integrity and service to the community. Affidavits were also presented from persons who would have similarly testified if called.

Rosenthal admitted that he did not reveal the crime to prosecutorial authorities but testified that, both before and after the payment to Zima, he had informed certain FSLIC officials of the extortion scheme hopeful that they would intercede on Pecord's behalf. (No FSLIC official, however, was called to substantiate this claim.) John A. Nordberg, an attorney who represented the FSLIC in the Pecord contract matter, testified that he had never been informed of any extortion plot against Pecord.

Like Carnow, Rosenthal offered several reasons for his failure to withdraw and his failure to disclose the crime. Among the reasons were the attorney-client confidentiality requirement, the political realities that allegedly existed at that time, and the possibility of economic or physical repercussions being brought against him or his client.

In mitigation, Rosenthal detailed his participation in professional and community service organizations. Several individuals testified as to Rosenthal's good reputation, and affidavits from other individuals, attesting to the same, were introduced into evidence.

Among its findings of fact, the hearing panel found that respondents were retained by Pecord for the lawful, legal purpose of obtaining a zoning variance; that, on the record before them, it appeared Pecord was entitled to the requested zoning variance but that his original petition was denied because of "political implications," that it was irrelevant that respondents had counseled their client against paying Zima's demand since the money was, in fact, paid and respondents played an active role in such payment. The panel further found that it was "probably believable that [respondents] and their families were threatened by Zima with economic and bodily harm" and that their client was also threatened. The panel concluded that Carnow had evaded telling the truth to Federal agents, that respondents had concealed criminal activity by failing to notify proper authorities, and that they knowingly counseled, assisted and participated in conduct which resulted in the furtherance of the crime of extortion.

On review before the Review Board, respondents took exception, *inter alia,* to the hearing panel's finding that they knowingly counseled, assisted and participated in conduct which resulted in the crime of extortion. The Review Board agreed with the hearing panel's findings of fact. The Review Board held that the evidence clearly established that respondents maintained contact with the extortionist; that they freely aided the extortionist in communicating his demands to their client; and that they did not withdraw their representation of Pecord when it became apparent that he would submit to the extortion. The Review Board concluded that "Participation by an attorney in an extortion is an offense which warrants disbarment • • •."

Here, respondents maintain that they are not legally or morally responsible for their conduct inasmuch as they were the unwilling victims of Zima's extortion demands. Their assertion that they, out of fear for their own safety and economic well-being, had no choice but to follow through with Zima's scheme is unpersuasive. Even if we assume that some sort of veiled threat was made against the respondents during their August 15 meeting with Zima, such threat would not explain or justify respondents' voluntary participation in the case prior to that date or their attempt to facilitate retention of "special zoning counsel" for Pecord. Furthermore, requiring the extortionist to produce proof of his misdeeds as a condition of payment does not seem the likely act of individuals acting under duress. Rather, it appears to be the act of persons seeking a guarantee that their client has received the service for which they had bargained.

The court, in *United States* v. *Kahn* (2d Cir. 1973), 472 F.2d 272, 278, aptly noted:

> "Almost every bribery case involves at least some coercion by the public official; the instances of honest men being corrupted by 'dirty money,' if not nonexistent, are at least exceedingly rare. The proper response to coercion by corrupt public officials should be to go to the authorities, not to make the payoff.

> Thus, unless the extortion is so overpowering as to negate criminal intent or willfulness, we would be loath to allow those who give in to the illegal coercion to claim it as a total defense to bribery charges."

Respondents assert, however, that had they notified authorities, their disclosure would have, at that time, fallen on politically deaf ears and could have possibly resulted in retaliation by political forces against them or their client. This is not only a wholly unacceptable excuse but, in fact, is specifically refuted, in part, by respondent Carnow's attorney, Joseph Lamendella, who testified that, based on his past experience in the United States Attorney's office, disclosure of Zima's activities would have been promptly acted upon.

Corruption within government could not, in most instances, thrive but for those few attorneys, who, like respondents, are willing to tolerate such illegal activity if it will benefit their client. The practice of law is a privilege and demands a greater acceptance of responsibility and adherence to ethical standards than respondents have demonstrated. Their conduct, in facilitating and participating in the paying of money to Zima, was clearly a breach of required professional conduct. Their activities discredited the integrity of the bar and impeded the administration of justice. For these reasons, we find that discipline must be imposed.

Respondent Carnow maintains that he should be disciplined less severely than respondent Rosenthal inasmuch as Pecord was Rosenthal's client, and he, Carnow, merely followed his employer's directions. Respondent Carnow has apparently overlooked the fact that, during his involvement herein, he was serving as an assistant Attorney General. Despite his obligations as a law officer, he knowingly participated in and furthered conduct which he knew to be illegal, and then, further, deliberately misled Federal agents. That Carnow was under emotional stress at the time does not excuse his failure to be forthright. In mitigation, however, we recognized Carnow's previous professional accomplishments.

We have also considered respondent Rosenthal's evidence in mitigation and his contention that, as an attorney, he was duty bound not to abandon his client in a time of need and was obliged to avoid actions which would, potentially, cause his client harm.

One of Rosenthal's excuses for not informing prosecutorial authorities is that such disclosure would have breached required attorney-client confidentiality. If Rosenthal, as he testified, informed certain FSLIC officials of the extortion scheme in the hope that they would intercede, it seems rather inconsistent to now argue that disclosure to some public authorities, but not to others, would constitute a breach of the confidentiality requirement. Whatever reasons Rosenthal might have had for not disclosing the criminal activity to individuals in a position to take direct action, it does not appear that scrupulous observance of an alleged attorney-client confidentiality requirement was one of those reasons. Without Rosenthal's assistance as an intermediary, Zima would have had considerably more difficulty in carrying out his scheme. We find Rosenthal's continued participation in the extortion plans to be without justification.

Accordingly, it is ordered that respondents be disbarred.

Respondents disbarred.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

APPENDIX D

ILLINOIS SUPREME COURT

Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 1, 1978

Mr. Joseph A. Lamendella
Attorney at Law
Suite 801
79 W. Monroe Street
Chicago, IL 60603

No. 50098 - In re: Donald S. Carnow and Benjamin Julian Rosenthal, Attorneys. Disciplinary Commission.

The Supreme Court today denied the petitions for rehearing in the above entitled cause. Mr. Justice Clark took no part.

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court

APPENDIX E

BEFORE THE HEARING BOARD
OF THE
ATTORNEY DISCIPLINARY SYSTEM
UNDER ILLINOIS SUPREME
COURT RULES 751-770

In the Matter of:

BENJAMIN JULIAN ROSENTHAL,
Attorney-Respondent.

Administrator's No. 76-CH-37

COMPLAINT

Carl H. Rolewick, Administrator of the Illinois Attorney Disciplinary System, complains of the Respondent, Benjamin Julian Rosenthal, and alleges that the Respondent, who was licensed to practice law in Illinois on November 17, 1952, and is still so licensed, has been guilty of conduct which tends to bring the legal profession into disrepute as follows:

1. At all times relevant to the matters hereinafter set forth, Respondent, together with his law partner, Donald Carnow, represented a client named Joseph R. Pecord, in legal matters arising from the purchase and rezoning of a parcel of improved real estate, commonly known as the Beverly Savings and Loan Building ("Beverly Building"), 8001 South Western Avenue, Chicago, Illinois.

2. Planning to convert the Beverly Building into a nursing home, Pecord, in January, 1969, entered into a contract with the Federal Savings and Loan Insurance Corporation to purchase said building. The contract pro-

vided that a failure of the buyer to complete the purchase would result in a forfeiture of his $50,000.00 down payment. Use of said building as a nursing home was not permitted under the provisions of the zoning ordinance of the City of Chicago and the contract to purchase was not made contingent upon a change in that zoning.

3. On or about May 13, 1969, the Respondent and Carnow filed in the Chicago City Council a petition seeking an amendment of the zoning ordinance which would rezone the area from B4-2 to R4 which in turn would permit the use of the Beverly Building as a nursing home. The petition was referred to the Committee on Building and Zoning of the Chicago City Council which scheduled public hearings on the petition for June 20, 1969.

4. On June 18, 1969, Stanley Zima, Secretary to the Committee on Building and Zoning met with Respondent and Carnow and told them that their petition was doomed but that there was pending before the City Council an ordinance which would permit the Board of Zoning Appeals to grant a zoning variance for nursing homes. Zima, assuming passage of the ordinance, further stated that with his help a zoning variance would be obtained but that his help would cost $20,000.00 to $30,000.00 and that the payment could be made as a political gift or as attorney's fees.

5. Public hearings were held as scheduled on June 20, 1969, but the Committee refused to recommend the petition's passage and the City Council defeated it. The Council, however, passed the above-described ordinance allowing the Board of Zoning Appeals to act on special zoning variances for nursing homes.

6. Respondent, Carnow, and their client, Pecord, decided to forego litigating the City Council's action on

their petition and to use the new variance procedure. Respondent further agreed to assist his client in making the payment which Stanley Zima had stated would be required to assure the desired zoning variance. These decisions were communicated to Zima during the last week of July, 1969.

7. On July 31, 1969, the application for a special zoning variance was filed with the Board of Zoning Appeals by the Respondent and Carnow on behalf of their client. The Board approved the special zoning variance on August 26, 1969.

8. Carnow met with Stanley Zima on September 3, 1976 at Toffenetti's Restaurant, to receive instructions as to how the $20,000.00 payment was to be made to Zima. On learning of the instructions from Carnow, Respondent telephoned Pecord and relayed them. Respondent told Pecord that on September 4, 1969, Carnow would accompany Pecord to the Michigan Avenue National Bank where, as instructed, Pecord would place $20,000.00 in cash into an envelope, write his name across the flap, and turn over the envelope to Carnow who would thereafter take the envelope containing the $20,000.00 to the lobby of the American National Bank where he would give it to the awaiting Zima.

9. The aforementioned instructions were followed except that Zima failed to appear on September 4, 1969, and Respondent and Carnow, after having moved the envelope containing the $20,000.00 from place to place, put it into the law office's safety deposit box until the next day when they retrived it and put it into the lock box in their office.

10. On September 5, 1969, Zima appeared at Respondent's law office where he received the envelope contain-

ing the $20,000.00 from Respondent in the presence of Carnow.

11. By reason of the hereinabove described conduct, the Respondent has:

(a) concealed or knowingly failed to disclose or come forward with information about the existence and commission of criminal activity;

(b) counseled and knowingly assisted and participated in conduct which resulted in the furtherance of a crime;

(c) engaged in conduct that is prejudicial to the administration of justice and that adversely reflects on his fitness to practice law;

(d) engaged in conduct involving the appearance of impropriety.

Wherefore, the Administrator prays that this case be assigned to a Panel of the Hearing Board for Cook County, that a date for a hearing on this complaint be set, that the hearing be conducted by such panel, that the panel make findings of fact and conclusions of fact and law, and a recommendation for such discipline of the Respondent as is warranted by findings.

Carl H. Rolewick, Administrator
Attorney Disciplinary System

By: /s/ Mary M. Conrad
Mary M. Conrad, Counsel

Mary M. Conrad
Counsel for Administrator
203 North Wabash Avenue
Suite 1900
Chicago, Illinois 60601
Telephone: (312) 346-0690

APPENDIX F

(Canon 4) "DR4-10: Preservation of Confidences and Secrets of a Client.

A. 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'Secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B. Except when permitted under DR4-101(c), a lawyer shall not knowingly, during or after termination of the professional relationship to his client:

(1) Reveal a confidence or secret of his client. . . ."

APPENDIX G

AFFIDAVIT

Benjamin Julian Rosenthal, being first duly sworn on oath deposes and states that if sworn as a witness he could competently testify as follows:

1. Affiant resides at 405 North Wabash, Chicago, Illinois, is licensed to practice law in the State of Illinois and presently has his law offices at 300 West Washington Street, Suite 817, Chicago, Illinois.

2. This Affidavit is made in support of Affiant's Petition for Certorari to the United States Supreme Court in that it sets forth certain pertinent facts concerning a meeting held between Affiant and others with the Administrator of the Disciplinary Commission which meeting had an important bearing on the nature of the defense to the Complaint subsequently filed against Affiant, as more fully set forth in Appexdix C, a copy of which is incorporated herein by reference.

3. On June 29, 1976 Donald S. Carnow and Benjamin Julian Rosenthal met in an informal conference with Carl H. Rolewick and John Dixon. Carl H. Rolewick was then the Administrator of the Illinois Attorney Registration and Disciplinary Commission and John Dixon was the Assistant Administrator. The meeting was held at the offices of the Administrator of the Illinois Attorney Registration & Disciplinary Commission, 203 North Wabash Avenue, 19th Floor, Chicago, Illinois. Mary Conrad, counsel for the Administrator, was present during the latter part of the meeting.

4. At the time of this meeting the Disciplinary Commission was litigating with John M. Daley the question as to whether the Commission had jurisdiction to discipline John M. Daley in view of a grant of immunity given to him under 18 USC Section 6002 immunizing his testimony against use in an attorney disciplinary proceeding. Prior to this meeting a preliminary inquiry board, at the urging of its counsel, Mary Conrad, had recommended that a Hearing Panel ascertain the facts concerning the extortion scheme in which Donald S. Carnow and Benjamin Julian Rosenthal acted as attorney for Joseph Pecord, as more fully set forth in the Federal Court case of *United States* v. *Zima* wherein Stanley Zima was convicted of extortion, with the further recommendation that the Hearing Board decide whether any discipline should be imposed upon the Affiant, Donald S. Carnow.

5. At this meeting the Administrator stated to Rosenthal and Carnow that the Administrator needed a case precedent establishing the jurisdiction of the Commission to discipline an attorney such as John M. Daley who admitted criminal acts as a participant in bribery schemes. The Administrator further stated that since Affiant and Donald S. Carnow had received a grant of immunity from the United States District Court at the time of the Hearing in *United States* v. *Zima,* the Administrator could use the precedent established in the disciplinary action against Affiant and Donald S. Carnow as an aid to it in an effort to discipline John M. Daley and others in a similar position. Since Affiant and Carnow were together with their client victims of extortion and were not perpetrators of either extortion or bribery, the Administrator said that Affiant and Carnow would either be dismissed or receive minimal discipline. Both Rolewick and Dixon

urged Rosenthal and Carnow to cooperate with them in a friendly suit that would go before the Illinois Supreme Court in order to establish jurisdiction of the Commission, set guidelines for other attorneys placed in similar situations and otherwise aid in the administration of justice.

6. Carnow at that time stated he wished to take the Florida Bar and he pledged his cooperation in return for the Administrator expediting the disciplinary hearing so that Carnow's name would be cleared. Rosenthal stated that at the time of the 1969 incident he was forced to make his decision without apparent available guidelines while being under duress because of the threats against his family, his client, his associates and their respective families, as well as the dilemma created by the confidentiality requirement of legal ethics. At that meeting Rosenthal further stated that he had discussed this incident over the years with the U.S. Attorney's Office and numerous attorneys, without there being a concensus as to what appropriate action he should have taken. Rosenthal urged the Administrator to establish a committee to explore making recommendations to the Illinois Supreme Court for the establishment of proper guidelines for attorneys whose clients were the victims of extortion. This is especially so in situations such as this which may involve the breach of Canon 4 of the Code of Professional Ethics if Rosenthal had made a disclosure to certain local authorities, contrary to Pecord's instructions. Rosenthal stated that his dilemma was particularly complicated in that Pecord believed that friends of the extortionist (political cronies) were in the local Cook County office of the U.S. Attorney and the State's Attorney in the year 1969.

7. Rosenthal also stated that he was told by Pecord that Illinois Supreme Court Justice William Clark, who

in 1969 was an attorney for Frank Schaeffer, the silent partner of Joseph Pecord, had counselled Pecord to tell Rosenthal in August, 1969 that Rosenthal's attempts to abandon Pecord, when Pecord was a victim of extortion, would be unethical, and that Rosenthal in 1969 had not personally discussed the matter with William Clark but had only received the purported message through Pecord. Rosenthal therefore asked the Administrator at this meeting whether the Administrator thought Rosenthal should discuss the situation with William Clark, who is now Illinois Supreme Court Justice Clark.

8. Both Rolewick and Dixon were friendly in their discussions with Carnow and Rosenthal. As to Rosenthal's statements, they responded that the best way to establish guidelines, as Rosenthal and Carnow desired, would be to allow this friendly suit to go to the Illinois Supreme Court after the pertinent facts were developed in the Hearing before the Panel. Rolewick and Dixon stated that this was a friendly suit and that the complaint would undoubtedly be dismissed, or at the worst bring censure or minimal suspension. Under the circumstances Rolewick and Dixon stated that it was not necessary for Rosenthal to discuss the matter with Justice Clark or elicit any testimony from him at the time. Dixon had stated at the meeting that under the facts here that he, under similar circumstances, "may have acted in the same manner as Rosenthal and Carnow". Rolewick and Dixon stated that they would instruct their attorneys to draw up the complaint so as not to unduly imply wrong doings on the part of Rosenthal and Carnow, and that the Complaint would not charge Rosenthal and Carnow with any crimes. They stated it would be a generalized complaint.

9. The Complaint, which was subsequently filed against Affiant on October 7, 1977, charged Affiant in general language of certain alleged improprieties, as more fully set forth in Appendix E, a copy of which is incorporated herein by reference.

10. As this had been presented to Rosenthal as being a friendly suit, Rosenthal, together with Carnow asked their law associate, Joseph Palmisano, to handle it for them even though he had been out of law school for less than a year and had never tried a major case. If Rosenthal had knowledge that it was not to be a friendly suit, with a charge of criminal intent being implied, he would have taken the following steps and tendered the following proof in his defense:

(a) The jurisdiction of Commission would have been challenged.

(b) Motion to Dismiss on grounds of laches and staleness would have been filed and argued together with other appropriate preliminary motions.

(c) Members of the Chicago Board of Zoning Appeal would have been subpoenaed for deposition and later produced at trial to establish that the extortionist did not pay them to influence their duties.

(d) Transcripts of the various administrative and legislative proceedings would be introduced into evidence, to show the extortionist's obstructive performance before the public bodies.

(e) Officials of the FSLIC may well have been compelled to testify.

(f) Rosenthal would have probably asked for a severance from Carnow at the Hearing stage.

(h) Rosenthal, prior to Hearing, would have taken discovery depositions of John Nordberg (now Judge Nordberg) and various members of the law firm and associates of Pope, Ballard, Shepard & Fowle.

(i) Rosenthal, prior to Hearing, may have taken discovery deposition of Justice William Clark, in that in 1969 Justice Clark was one of the attorneys who Pecord supposedly talked to about the incident in question when Rosenthal stated that he was not going to represent Pecord unless Pecord was willing to take the matter up with the Attorney General in Washington, D.C.

11. The first time that disbarment was mentioned was in the closing argument of the attorney for the Administrator.

Further Affiant sayeth not.

Subscribed and Sworn to before me

this ..... day of ....., 1979.

.....
Notary Public

.....
BENJAMIN JULIAN ROSENTHAL

Supreme Court, U. S.
FILED
FEB 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

Nos. 78-1180, 78-1193

BENJAMIN JULIAN ROSENTHAL,
Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,
Respondent.

DONALD S. CARNOW,
Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,
Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1180, 1193.

BENJAMIN JULIAN ROSENTHAL,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

DONALD S. CARNOW,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

STATEMENT OF THE CASE.

Petitions number 78-1180 and 78-1193 arise from the judgment of the Supreme Court of Illinois in the case of *In re Donald S. Carnow and Benjamin Julian Rosenthal, Attorneys,* case No. 50098, entered October 6, 1978, 352 N. E. 2d 257. Since

the instant *petitions* arise from the same case and the questions raised are similiar, Respondent submits the following in opposito both *petitions*.

STATEMENT OF FACTS.

Petitioners testified under grants of immunity in the federal criminal trial of Stanley Zima which trial resulted in the conviction of Zima for the crime of extortion. As revealed in the *petitions*, petitioners testified in the criminal trial that Zima sought and received $20,000 in order that he not block a rezoning application filed by petitioners' client. The nature and extent of petitioners' involvement in the extortion scheme was the issue in the disciplinary proceeding below.

Petitioners characterize themselves as extortion victims as was their client and the factual statements contained in the *petitions* reflect their attempt to minimize their involvement. Respondent refers this Court to the opinion of the Court below (attached as Appendix C to each *petition*) which carefully sets out the facts and reveals that petitioners knowingly participated in and facilitated the extortion scheme.

STAGE IN THE PROCEEDINGS BELOW AT WHICH FEDERAL QUESTIONS WERE RAISED.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(c). The opinion of the Court below is silent as to any federal questions which may have been raised by petitioners. Nevertheless, each petitioner asserts that appropriate federal questions were raised, ". . . at every stage of the proceedings, from the first instant at which the question of penalty was considered." (*Carnow petition*, p. 10, *Rosenthal petition*, p. 17). The record is contrary.

Illinois Supreme Court Rules create a disciplinary process consisting of an Inquiry Board, Hearing Board and Review Board. *Ill. Rev. Stat.*, 1977, Ch. 110A § 751-770. The Hearing

Board is comparable to a trial court and the Review Board, an appelate court of initial review.[1]

Illinois Supreme Court Rules provide in cases where discipline is recommended by either board, the attorney involved may file exceptions to the report of the Hearing Board with the Review Board or to the report of the Review Board with the Supreme Court of Illinois. *Ill. Rev. Stat.*, 1977, Ch. 110A § 753(e).

Each petitioner filed exceptions to the report and recommendation of the Hearing Board. Although the Hearing Board had recommended that petitioners be disbarred, no federal questions were raised by either petitioner in his exceptions.

Each petitioner also filed exceptions in the Supreme Court to the report of the Review Board. Again petitioner Rosenthal raised no federal question whatsoever. Petitioner Carnow stated:

> . . . the Administrator neither *pleaded* nor proved by clear and convincing evidence that Respondent's conduct was the product of fraudulent, dishonest or corrupt intent or motives. Respondent respectfully submits the failure to plead is violative of Respondent's 14th Amendment substantive due process rights and is fatal error In re: Smith, 356 Ill. 11, 5 N.E.2d 227. (*Carnow Exceptions to Report of Review Board*, Appendix D, p. A26).

Further, apparently referring to the mandate of the Supreme Court of Illinois that the Administrator of the Attorney Registration and Disciplinary Commission investigate conduct of attorneys which tends to defeat the administration of justice or bring the courts or the legal profession into disrepute (*Ill. Rev. Stat.*, 1977, Ch. 110A § 752), petitioner Carnow said:

> This standard has been unconstitutionally applied to the Respondent, and thus violative of Respondent's 14th Amendment Right to substantive due process of law in that the complaint failed to plead "intent" to perform a fraudulent, dishonest or corrupt practice as an essential element

1. Both the Hearing Board and the Review Board recommended that petitioners be disbarred.

thereof. See *In re: Ruffalo*, 390 U.S. 544. Substantive due process is required as matter of law in attorney disciplinary proceedings. (*Carnow Exceptions to Report of Review Board*, Appendix D, p. A28).

The opinion of the Court below is primarily a factual recitation of the extent of petitioners' involvement in the extortion scheme. The Court's opinion does not reflect that any of petitioner Carnow's purported federal questions were further briefed or argued.

Each petitioner filed a petition for rehearing of the decision of the Supreme Court of Illinois. Petitioner Rosenthal for the first time suggested that disbarment in his case would violate the Sixth, Eighth and Fourteenth Amendments. (*Rosenthal petition for rehearing*, Appendix E, pp. A30, A33). Petitioner Carnow argued that disbarment violates his Sixth Amendment right to know the charge against him, amounts to denial of equal protection of the laws, and constitutes cruel and unusual punishment. (*Carnow petition for rehearing*, Appendix F, p. A39).

The Illinois Court denied the petitions for rehearing without specifically addressing the questions raised.

REASONS FOR DENYING THE WRIT.

I. Petitioner Rosenthal Has Failed to Raise Timely Any Federal Questions.

Petitioner Rosenthal argues that the decision of the Court below disbarring him constitutes a denial of "due process and equal protection of the laws in violation of the United States Constitution" (*petition*, p. 22), "cruel and unusual punishment in violation of Amendment 8 of the United States Constitution" (*petition*, p. 36) and contravenes the immunity order of March, 1973 which is valid and binding pursuant to the *All Writs Act*, 28 U. S. C. § 1651, the Court's inherent common law power

and the supremacy clause of Article VI of the United States Constitution (*petition*, p. 30).[2]

It has long been held that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Tacon* v. *Arizona*, 410 U. S. 351 (1972). Further, raising a federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the Court entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson*, 326 U. S. 120 (1945).

Petitioner Rosenthal asks this Court to review questions not raised in the proceeding below. Consideration of the Rosenthal petition and the record before the Court reveals that petitioner is really asking this Court to review the merits of the case against him. He has presented no justiciable federal question.

II. Petitioner Carnow Has Raised No Substantial Federal Question.

The Carnow petition constitutes a blatant attempt to mislead this Court as to the nature and extent of petitioner's involvement in the payoff scheme. Petitioner attempts to further mislead this Court by suggesting that the Court below is corrupt and that its disbarment of him was politically motivated revenge for having testified against a local official. Though unsupported by anything in the record, petitioner's contention is consistent with his self-righteous pose throughout the proceeding below. As proved by the evidence, petitioner is a bagman lawyer. His willingness to sacrifice professional obligations to the economic interests of himself and his client is reflected in his attempt to mislead this Court.

---

2. Petitioner had asserted immunity as an affirmative defense before the Hearing Panel. The Panel overruled that defense (*Report of the Hearing Panel*, Conclusions, par. 6; see Appendix to Petition, p. 5a). Petitioner took no exception to that ruling until now.

Petitioner Carnow was charged in the proceeding below with, among other things, having, "counselled and knowingly assisted and participated in conduct which resulted in the furtherance of a crime (*Complaint*, par. 13(b); see *Petition*, p. 22a). Throughout the proceeding below and in this Court, petitioner Carnow has maintained that he was a victim of extortion, coerced to such an extent that his acts were unwitting; hence he lacked sufficient "intent" to be held professionally responsible for his acts while so "coerced". The Court below rejected petitioners argument as not supported by the evidence.

The "federal questions" raised by petitioner in the proceeding below and in this Court are an attempt by petitioner to transform his unproved factual defense into a legal issue of constitutional significance.

Although cast in constitutional terms petitioner Carnow is asking that this Court review the weight and sufficiency of his factual defense. This Court has long held that certiorari will not be granted to review a lower court's analysis of particular facts involved. *United States* v. *Johnston*, 268 U. S. 220 (1924).

III. The Decision of the Court Below Is Based Upon an Adequate and Independent State Ground.

The Court has long recognized that the individual state's interest in maintaining and regulating its judicial system is a compelling one. *Collector* v. *Day*, 78 U. S. 113 (1870); *Konigsberg* v. *State Bar of California*, 358 U. S. 252 (1957); *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975). Certainly this Court may intervene where valid constitutional questions are raised. *Spevack* v. *Klein*, 385 U. S. 411 (1967); *In re Ruffalo*, 390 U. S. 544 (1968).

The record below reveals that petitioners were afforded notice of the charge and an opportunity to defend. *In re Ruffalo, supra.* Indeed a lengthy hearing was held and petitioners called witnesses. The disbarment of petitioners constitutes the exercise

of the Illinois Court's inherent power to discipline attorneys admitted to practice before it. *In re Sherman*, 60 Ill. 2d 590, 328 N. E. 2d 553 (1975).

CONCLUSION.

For the reason stated above, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of: BENJAMIN JULIAN ROSENTHAL, *Respondent.*	No. 76 CH 36 76 CH 37 Consolidated

EXCEPTIONS TO THE REPORT OF THE HEARING PANEL

Now comes Respondent Benjamin Julian Rosenthal, by his attorney Barry J. Freeman, and files his Exceptions to the Report of the Hearing Panel as follows:

I.

Exceptions to Finding of Fact

A. In the Panel's *Finding of Fact* there are omitted a substantial number of proven facts which are material to the ultimate decision to be made by the Board. The omitted material facts which should be included in the Hearing Panel's Report are as follows:

(1) Paragraph 3 alludes to denial of the zoning variance "because of political implications brought forward by the Ward Committeeman". This reference is "politically" vague. In reality, the denial was perpetrated (as Stanley Zima predicted) for the purpose of laying a foundation for the extortion that followed.

(2) Paragraph 4 should be expanded to include the fact that on June 18, 1969, two days prior to the hearing, Zima, then Secretary to the Committee of Building and Zoning, stated that he could help get the zoning approved but that it would require the payment of attorneys' fees or political contributions in the sum of $20,000 to $30,000 and that, if said sums of money were made available, Pecord's zoning change would not be blocked by the local Ward Committeemen.

(3) Paragraph 4 should further reflect that Respondent specifically repudiated Zima's suggestion and told him "I think on the merits I'm going to get it on the presentation. At least we are going to try, and if we do get rejected, Mr. Carnow and I have discussed this, and we believe that once there is a rejection and we have exhausted our Administrative Remedy, we can go in for a Declaratory Judgment and get fast action. . . ". (Tr. pp. 86-90, 159-162).

(4) Paragraph 4 should further note that Respondent did not relate the June 18, 1969 conversation with Zima to his client and Respondent proceeded to prepare for the June 20 presentation before the Committee. (Tr. pp. 162, 163).

(5) On June 20, 1969 objections to Pecord's petition were made by the local Ward Committeemen and the Committee made no recommendation, which in fact defeated the petition and denied Respondent the ability to appeal.

(6) On June 23, 1969 a Special Use Ordinance was passed by the City Council, the nature of which would permit the use of the property in question as a nursing home under a strict construction of the City of Chicago Ordinances. Respondent endeavored to seek an extension of time on Mr. Pecord's contract with the FSLIC for the purchase of the subject property, so that he could proceed under the new ordinance. The FSLIC, however, refused

any further extensions of time unless the zoning change was acquired.

(7) Paragraph 6 of the Panel's findings should be expanded to include the fact that shortly after the hearing of June 20 Zima made a series of threatening telephone calls to Donald Carnow, wherein he stated that unless Pecord paid the required fee Zima would see to it that Pecord would never obtain the zoning and that the nursing home would never be opened and that Pecord would be forced into bankruptcy. (Tr. pp. 46-51, 180, 371-372).

(8) Mr. Pecord communicated to Respondent in late July of 1969 that he would pay the $20,000 as demanded by Zima. Respondent at that time advised Mr. Pecord that he would withdraw as counsel. (Tr. pp. 132-135).

(9) The Panel's paragraph 6 should be further expanded to reflect that on August 15, 1969 a meeting occurred between Zima, Carnow and Rosenthal, wherein Carnow and Rosenthal informed Zima that they were withdrawing from representation of Pecord. At that time Zima persisted in his threats against Pecord and further stated that Respondent and Carnow had to remain in the matter; that if they went to the federal authorities neither Carnow nor Respondent would ever practice law again in the City of Chicago.

(10) The Panel's paragraph 6 should be further expanded to reflect that Respondent under threat of Zima and fear for the safety of his client, his associate, their families, as well as himself and his family, complied with Zima's demands.

(11) The Panel should have further found that Respondent was a victim of Zima's extortion and that he was also duty-bound to comply with his client's desires, where his client stood exposed to injury if he did not comply with the extortion.

(12) The Panel should have found in addition that Respondent reasonably perceived that complaints to the prosecuting authorities about Mr. Zima's activities and the activities of the City Council would fall on deaf ears and might ultimately result in the type of retribution to himself and his client which was threatened by Zima.

(13) Finally, the Panel should have found that during Respondent's entire 24 years of the practice of law he always conducted himself in a manner consistent with the highest traditions of the bar. Respondent's reputation in the business and legal community has been excellent and he has willingly engaged in matters of community interest, sometimes on a *pro bono* basis. (Tr. pp. 112, 211, 334-338, 340-342, 351, 354-357, 266, 317).

B. Paragraph 5 of the Panel's Finding of Fact holds it to be immaterial that Respondents counseled their client against paying the money to Zima since Respondents eventually played an active role in paying it. This is not a finding of fact but is instead an erroneous conclusion of fact and law. Respondent emphatically objects to this ruling in that the Panel here totally ignores the fact that Respondents did counsel Pecord against paying the money to Zima until Respondents themselves became the *victims* of Zima's extortion, at which time by definition their "active role in paying it" was involuntary and under physical and economic threat. Paragraph 5 is thus totally inconsistent with the Panel's paragraph 6 which affirms Respondents' position that they themselves were victims of Zima's extortion.

II.

Exceptions to the Panel's Conclusions of Fact and Law.

A. The Panel's Conclusions of Fact and Law are inconsistent with the facts in the record.

(1) Respondents' failure to come forward and notify the proper authorities was the result of Zima's threats and

the reasonable fear that those authorities would fail to act or protect Respondents under the prevailing political atmosphere at the time.

(2) Cannon 4, DR4-101(c), prohibited the disclosure of client confidences since such disclosure could reasonably have subjected the client to economic disaster, a power which was well within Zima's sphere of influence.

(2) Although it is true that Respondent knowingly engaged in conduct prejudicial to the administration of justice, such conduct was the result of Zima's extortive demands and under those circumstances could not adversely reflect on Respondent's fitness to practice law. The facts reflect that Respondents were not willing participants in Zima's crime and that they acted as victims of that crime.

(3) There is no evidence that Respondents or their client possessed the requisite intent to do anything improper absent Zima's threats which compelled them to act against their will.

B. The Panel's conclusions failed to recognize the ruling of the Illinois Supreme Court which require clear and convincing evidence of evil motive and intent before disbarment is appropriate. *In Re Lasecki*, 358 Ill. 69; *In Re Haliman*, 384 Ill. 325; and *In Re Donhghy*, 402 Ill. 120. The Administrator has failed to establish such motive or intent.

III.

Exception to the Recommendation of the Panel.

The recommendation of the Panel of disbarment is entirely unwarranted in light of the facts proven in the record; it is further cruel and harsh in light of *In Re Leonard*, 64 Ill. 2d 398, and *In Re Bourgeois*, 25 Ill. 2d 47.

The only question for consideration by the Panel should have been whether or not the record proves that Respondent willingly

aided in the commission of a crime, or if he himself was a victim of that crime. The record is conclusive of the latter. As victims, in fear of their own physical and economical well-being as well as the well-being of their client, their actions should not have warranted discipline of any kind, let alone the harshest discipline of disbarment. The conclusion of this Panel is tantamount to the prosecution of a rape victim for adultery, and its recommendation should be reconsidered.

Respectfully submitted,

/s/ BARRY J. FREEMAN
Barry J. Freeman
Attorney for Respondent

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APPENDIX B

BEFORE THE REVIEW BOARD OF THE ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

In the Matter of: DONALD S. CARNOW, *Respondent.*	No. 76-CH-36, 76-CH-37 Consolidated

AMENDED EXCEPTIONS TO REPORT OF HEARING BOARD AND REQUEST FOR LEAVE TO FILE BRIEFS AND FOR THE MAKING OF ORAL ARGUMENT.

NOW COMES the Respondent, DONALD S. CARNOW, by his attorneys, SCHIPPERS, BETAR, LAMENDELLA & O'BRIEN, and files his Exceptions to the Report of the Hearing Board and further Petitions and respectfully requests leave to file Briefs and to present oral argument.

Preliminary Statement

The Hearing Board has concluded that Respondent's conduct must result in the grave sanction of disbarment. In reaching that conclusion, the Board failed to consider the overriding fact that Respondent's actions were not voluntary but rather the result of duress.

Respondent was the victim of an extortion. He yielded to the demands of the extortionist only because of the fear he had that the extortionist would carry out threats to injure Respondent and his family.

Exceptions to Findings of Fact

Respondent respectfully suggests that the Findings of Fact entered by the Hearing Board are incomplete by virtue of omitting the following facts:

1. Respondent was engaged in the private practice of law for approximately 6 months when he became involved in the Pecord matter. He was then 26 years old and employed as an associate for Ben Rosenthal on a space for services basis. (Tr. 30, 156-157, 253, 371.)

2. On June 18, 1969, Stanley Zima met with Respondent and Ben Rosenthal. Zima informed Respondent and Rosenthal that Pecord's "Spot Zoning Petition" was doomed for disaster as the local Ward Committeeman was going to block it before the Committee on Building and Zoning. Zima stated that the members of the City Council Committee on Building and Zoning would grant the local Ward Committeeman aldermanic courtesy and that said Zoning Petition would be defeated. Zima said that he could help but that it would require the payment of attorney's fees and political contributions in the sum of $20,000.00 to $30,000.00, and that if said sums of money were made available, Pecord's Zoning change would not be blocked by the local Ward Committeeman. Respondent specifically rejected Zima's proposal. (Tr. 37-42, 86-90, 159-162, 366).

3. On June 20, 1969, public hearings were held on Pecord's petition. During the hearing, objections were made by the local Ward Committeeman and Pecord's petition was denied. (Tr. 90, 164-165).

4. Shortly after the public hearings referred to in paragraph 3, there were a series of threatening telephone calls from Zima to Respondent. The substance of what Zima said in these telephone calls was that unless Pecord used Zima's attorney and paid a fee of $20,000.00, Zima would see to it that Pecord would never obtain the zoning, that the nursing home would never be opened and that Pecord would be forced into bankruptcy. (Tr. 46-51, 180, 371-372).

5. On August 15, 1969, a meeting occurred between Zima, Rosenthal and Respondent. The substance of the conversation at that meeting was that Rosenthal and Respondent told Zima that they would withdraw from representation of Pecord. Zima replied, in essence, that they could not withdraw, that he had already incurred multiple obligations in the Pecord matter, and that he would see to it that his obligations were Respondent's obligations and that Rosenthal and Respondent must go ahead on the Pecord matter. Respondent and Rosenthal then stated that they regarded Zima's threats as an attempt to intimidate them and an extortion of Pecord and that if the threats continued, Respondent and Rosenthal would go to the Federal Bureau of Investigation. Zima repeated and persisted in his threats and stated that if the Federal Bureau of Investigation was informed of this matter neither Rosenthal nor Respondent would ever practice law again in the city of Chicago. (Tr. 56, 96-97, 196-198, 373-374).

6. Respondent took Zima's threat that Respondent would never practice law again in the most literal sense. Respondent's knowledge of Zima's reputation was that Zima had a history of inflicting severe physical injury upon anyone who opposed him in a matter of material interest to him. For many years Respondent had been a resident of the same community as Zima and had heard on many occasions that actual acts of physical violence were fostered and encouraged by Zima. By virtue of Zima's reputation, his conduct toward Respondent, the statements made to Respondent, and his interest in the Pecord matter, the state of Respondent's mind was that he then feared Zima would cause acts of physical violence to be inflicted upon him.

Respondent's testimony is illustrative of his state of mind:

> "I grew up in an area known as, 'South Shore Valley,' 'South Shore Gardens,' which was east of the South Chicago Community, and I went to high school and I lived

there and in my college years, and I came to know that community very well and ultimately became a member of that ward organization and there's a certain tenor and there's a certain mentality about that community that I can't describe, but I think it's best described—I don't know if you read the Chicago Guide. There's one or two articles, one in November, one in December, about Milltown, and there's a certain mentality. It's a very, very tough mentality. It's a labor union-type mentality wherein political campaigns, physical violence was not uncommon, and in that ward, being a member of that ward organization, I came to know that Zima had members of—members of his ward organization who I can best describe as labor [g]oons (sic). I'm not saying he caused harm to be done, but, you know, when your opposition in a political campaign suddenly find themselves with being assaulted or being involved in fights with bloodshed, and what have you, and a man sits back and tolerates it, he fosters it, he's primarily responsible for it, and those thoughts flashed in my mind and I believe that the people with whom he was associating could do physical harm, and as a result of it, I acquiesced." Tr. 374-375.

7. Subsequent to the August 15th meeting referred to in paragraph 5, in a conversation between Respondent and Rosenthal, Respondent informed Rosenthal that he was frightened. (Tr. 197-198).

8. Respondent then complied with Zima's demands because he feared for the safety of his family and his own safety. (Tr. 374-375).

9. In June and July, 1972, prior to the time Respondent discussed the Pecord matter with the agents, Zima told Respondent that there is an Internal Revenue Service investigation going on, that if Respondent should be contacted by the agents, Respondent better make sure that Zima's name never comes up, that Respondent tell Zima if he is questioned by the agents, and that Respondent say the right thing if he and his family wanted to remain healthy. At the time Respondent did tell Zima that

agents were investigating the Pecord matter. Zima specifically told Respondent to use the "deadman's story". Zima said "you tell them you gave it to Gardner if you know what's good for your safety, your family's safety . . . just make sure your health insurance is paid up." (Exhibit 1, pages 90-91)

10. On July 17, 1972, Respondent's automobile was burned in the driveway of his home. Respondent learned of this prior to meeting with the Internal Revenue Service agents that very day. (Tr. 384-387).

11. Respondent's state of mind became one of utter confusion and desperation caused both by fear and severe depression. Almost immediately after the fire in his automobile and seeing the agents, Respondent consulted Dr. William G. Fischer, a clinical psychologist. After the fire and while Respondent was consulting Dr. Fischer, Respondent received innumerable calls on his unlisted home telephone at all hours of the day and night. In the last week of August, 1972, a break-in was attempted at Respondent's home some time after midnight. Reference to brief excerpts of Respondent's testimony indicate the desperate mental state he was in at that time:

> "Threats had been made to me, and my family . . . I was so anguished that I took my family out of Chicago completely, . . . You know, I thought that the world was coming in on me" Tr. 396

12. The immunity order entered against Respondent was primarily utilized as a vehicle to obtain the speedy and totally committed cooperation of the Justice Department in protecting Respondent and his family. (Tr. 278-280).

13. During the entire period of Respondent's law practice, other than the Pecord matter, Respondent has always comported himself in a manner consistent with the highest traditions of the Bar. Respondent's reputation in the business and legal community is excellent and Respondent has willingly engaged in a vast number of *pro bono* matters and community interest cases.

(Tr. 109-110, 211-212, 220-221, 255-260, 266-268, 314-315, 318-319, 341-345, 352, 355-357).

14. During the period Respondent had first met with the agents, he was clinically depressed and, in the professional opinion of Dr. William Fischer, evidenced symptoms of mental processes and conduct consistent with that of a person whose actions were motivated by extreme fear. (Tr. 212-217)-.

Exceptions to the Conclusions of Law and Fact.

The conclusions and recommendations of the Hearing Board are essentially predicated on the concept that Respondent knowingly engaged in certain acts. By and large, Respondent agrees with the conclusions that certain apparent unethical acts were done with his knowledge. However, it is respectfully submitted that the Board has failed to recognize that culpability requires "willfulness". A willful act requires not only that the act be knowingly performed but that it be voluntarily performed. The act of a bank teller in handing money to one who demands it while pointing a Thompson submachine gun at the bank teller is admittedly done knowingly but certainly not a voluntary act. Acts committed, therefore, under actual or threatened duress, coercion, physical force, or other compulsion do not subject the actor to accountability.

Respondent respectfully submits that under the peculiar factual circumstances the recommendation of the Hearing Panel to disbar him is cruel, harsh and extreme. Respondent was the victim of an extortion who, by virtue of the threats made against him and the fear those threats generated, involuntarily engaged in acts which are as repugnant to him as they are to the Hearing Board. However, the extreme sanction of disbarment must not be imposed against one who, by all standards of justice, was an unwilling victim of the criminal conduct of another.

Request for Briefs and Oral Argument.

It is respectfully suggested, because of the unusual nature of this case and because of the recommendation of the Hearing Board, that a briefing schedule be set and oral argument permitted. The Review Board's attention is respectfully directed to two cases which highlight the severity of the sanctions proposed against Respondent and which further serve to illustrate the fact that Respondent's case is *sui generis*. *In Re Leonard*, 64 Ill. 2d 398 (1976) involved an Attorney who was suspended after the establishment of a continuous course of conduct, conviction of the crimes of bribery and mail fraud, and a long standing series of acts involving moral turpitude. *In Re Bourgeois*, 25 Ill. 2d 47 dealt with an attorney who was suspended for embezzling funds but who established such acts were carried out under emotional distress.

The Review Board must, it is respectfully suggested, prior to ruling, be fully aware of all relevant disciplinary cases and the law relating to extortion and accountability. We again urge, therefore, that briefs and oral argument be permitted.

Respectfully submitted,

/s/ JOSEPH A. LAMENDELLA,
Joseph A. Lamendella,
Attorney for Respondent

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236-5517.

APPENDIX C-1

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

In the matter of: BENJAMIN JULIAN ROSENTHAL, *Respondent.*	No. 76-CH-36 76-CH-37 Consolidated

EXCEPTIONS TO REPORT OF REVIEW BOARD, PETITION FOR LEAVE TO FILE ADDITIONAL EXCEPTIONS AND REQUEST FOR LEAVE TO FILE BRIEFS AND FOR THE MAKING OF ORAL ARGUMENT.

Now Comes Respondent, Benjamin Julian Rosenthal, by his attorney, Barry J. Freeman, and files his exceptions to the Report of the Review Board, requests twenty-one (21) days' leave to file additional exceptions, requests leave for the filing of briefs, and requests oral argument in this cause, or in the alternative for an Order reversing and dismissing the Complaint herein.

Exceptions to Report of Review Board and Recommendation of the Review Board

Respondent, pursuant to Supreme Court Rule 354, incorporates by reference his exceptions to the Report of the Hearing Panel heretofore filed with the Review Board. For purpose of convenience, a copy is attached hereto and incorporated herein.*

Request for Leave of Court for an Additional Twenty-One (21) Days to File Further Exceptions

Respondent respectfully requests leave of Court to file further additional exceptions in this matter and for his reason

* Attachment is not included in this Appendix.

states that his attorney, Barry J. Freeman, has been actively engaged in the preparation of several briefs and since October 4, 1977 has been unable to give appropriate time to the review of the record and preparation of detailed exceptions in this cause.

Request for Briefs and the Making of Oral Argument

It is respectfully submitted, because of the unusual nature of this case and because of the harsh, anomalous and perplexing recommendation that a briefing schedule be set and oral argument be permitted. For purpose of convenience, a copy of Respondents' Brief filed before the Review Board is attached hereto and incorporated herein.

/s/ BARRY J. FREEMAN
Barry J. Freeman

BARRY J. FREEMAN
100 West Monroe Street, Room 2100
Chicago, Illinois 60603
Telephone: STate 2-0337

APPENDIX C-2

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

In the matter of:	No. 76-CH-36
BENJAMIN JULIAN ROSENTHAL,	76-CH-37
Respondent.	Consolidated

BENJAMIN JULIAN ROSENTHAL'S EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE REVIEW BOARD

The Report and Recommendations of the Review Board is defective and erroneous in the following particulars:

1. The Review Board, like the Hearing Panel, totally ignores all evidence of character and background as well as all mitigating factors surrounding the facts of this matter, in reaching its decision to affirm the Panel's recommendation of disbarment. The policy of the Review Board, as expressed by counsel for the Administrator during oral argument before this Court on September 15, 1977 in *In re: Kein* (Docket No. 49417), to disbar an attorney any time he is involved in the payment of money, is apparently the cause of the Board's persistence in ignoring facts in mitigation. This policy is contrary to the clear precedent established by the Supreme Court. See *In re Costigan* (1976), 63 Ill. 2d 230, 236-37; *In re Lee Marshall* (1977), Slip Opinion—Docket No. 48892, p. 7.

2. The Review Board reiterates the erroneous conclusion of the Hearing Panel that Respondents knowingly counseled, assisted and participated in conduct which resulted in the extortion which was perpetrated against their client. The Board also finds that Respondents' position, that their acts in this regard were not performed wilfully, is unsupported by the evi-

dence. This finding by the Review Board ignores Finding of Fact number 6 of the Hearing Panel that "Respondents maintain and it is probably believable that they and their families were threatened by Zima with economic and bodily harm and that their client was threatened".

3. The Review Board concludes that, "Participation by an attorney in extortion is an offense which warrants disbarment . . ." This is a sweeping statement which in this case encompasses attorneys who were themselves victims of the extortion, and who, through threat of physical and economic force against themselves and their client, were compelled to participate. The Review Board, like the Hearing Panel, fails to make the distinction between attorneys who participate as aiders and abettors of the extortion as opposed to those who participate as victims. The record of these proceedings firmly establishes that Respondents fall within the latter description of "participants".

Respectfully submitted,

/s/ BARRY J. FREEMAN
Barry J. Freeman
Attorney for Respondent
Benjamin Julian Rosenthal

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APPENDIX D

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

In the matter of: DONALD S. CARNOW, *Respondent.*	No. 76-CH-36 76-CH-37 Consolidated

EXCEPTIONS TO REPORT OF REVIEW BOARD AND REQUEST FOR LEAVE TO FILE BRIEFS AND FOR THE MAKING OF ORAL ARGUMENT

To: The Honorable Justices of the
Supreme Court of the State of Illinois

Now Comes the Respondent, Donald S. Carnow, by his attorneys, Schippers, Betar, Lamendella & O'Brien, and files his Exceptions to the Report of the Review Board and further petitions and respectfully requests leave to file Briefs and to present oral argument, or in the alternative, for an Order reversing and dismissing the Complaint.

Preliminary Statement

The Review Board has concluded that Respondent's conduct must result in the grave sanction of disbarment. In reaching that conclusion, the Review Board failed to consider the overriding fact that Respondent's actions were caused by threats of physical and economic harm to himself and his family. Respondent was the victim of extortion. He yielded to the demands of the extortionist to prevent physical and economic harm to himself and his family, and not to influence anyone or for assurances of favorable zoning treatment. Nevertheless, as a policy matter, the Review Board has taken the posture, as was

stated by Counsel for the Administrator during oral argument before this Court in *In re: Kein* (Docket No. 49417—argued September 15, 1977—decision pending), that anytime an attorney is involved in the payment of money, he should be disbarred regardless of the circumstances.[1] This view as will be seen is ludicrous. There are two aspects to the transmission of money—the payment and receipt. The fact that the recipient of the money has committed an illegal act, i.e. extortion, does not change the fact that the payment is justifiable, and not subject to sanction.

It was found as fact by the Hearing Panel that Respondents were the victims of extortion. However, the Review Board ignored this vital and compelling distinction which resulted in the anomalous, and startling decision which now confronts this Honorable Court. The Board's use of a shotgun in a situation which requires the use of a scalpel is appalling. One must look to the man in the particular setting; the reason for the conduct; and the nature of his character before imposing the grave sanction of disbarment. "The doctrine of Stare Decisis cannot really be applied to the particular discipline meted out in any particular case, as the conduct of each Respondent must be judged individually and the discipline in each case must turn upon the particular factual situation presented." *In re: Nesselson*, 35 Ill. 2d 454, 461. *In re: Leonard*, 64 Ill. 2d 398. Here, Respondent's sole intent was to protect himself and his family from physical harm. He did not seek to influence anyone nor did he intend to engage in any fraudulent, dishonest or corrupt practices.

1. The February 28, 1977 *Kein* Decision of the Review Board antedated the Hearing Panel's report in this case. Though the Hearing, here, before the Hearing Panel closed December 2, 1976, it took four and one-half (4½) months for a decision. The date of the Hearing Board's report, here, is April 19, 1977. Respondent concludes that the Review Board's *Kein* recommendation to disbar (greatly increasing the *Kein* Hearing Panel's recommendation of a thirty (30) day suspension), brought about this Hearing Panel's recommendation to disbar. There is no other lurking or underlying reason, except the Review Board's ludicrous policy position now before the Court.

Exceptions to Findings of Fact

Respondent respectfully suggests that the Findings of Fact entered by the Hearing Board and affirmed by the Review Board are incomplete by virtue of omitting the following:

1. Respondent was engaged in the private practice of law for only six (6) months when he became involved in the Pecord matter. He was then 26 years old and employed as an associate for Ben J. Rosenthal on a space for service basis. (Tr. 30, 156-157, 253, 371). Pecord had not been Carnow's client; Carnow never billed for his time nor did he receive a fee for this matter; he acted in a subordinate role, more or less as a law clerk; and had desired to report the extortion but had been dissuaded in a conversation with Rosenthal[2], (see paragraph 8), and further feared that a police investigation which might not lead to a prosecution because of evidentiary problems, would alert Zima and would endanger himself and his family.

2. On June 18, 1969, Stanley Zima met with Respondent and Ben Rosenthal on the pretext that he wanted to offer friendly advice. Zima informed Rosenthal and Respondent that Pecord's "Spot Zoning Petition" was doomed for disaster as the Local Ward Committeeman was going to block it before the Committee on Building and Zoning.

Zima stated that the members of the City Council Committee on Building and Zoning would grant the Local Ward Committeeman aldermanic courtesy and that said Zoning Petition would be defeated. Zima said that he could "help" but that it would require the payment of attorney's fees and political contributions in the sum of $20,000.00 to $30,000.00, and that if said

2. On or about August 16 or 17, 1969, Rosenthal had sought to withdraw from representing Pecord but had later concurred with his client that it would be immoral and unhumanistic to abandon a client facing bankruptcy due to the gun of the extortionist, and a breach of the attorney-client privilege to reveal confidences. Carnow considered Rosenthal, being older and more experienced, to be scholarly, trusted him and looked to him as a mentor. Being fearful and confused, Carnow relied upon Rosenthal.

sums of money were made available, Pecord's Zoning change would not be blocked in the City Council by the Local Ward Committeeman and Alderman. Both Respondents specifically rejected Zima's proposal. (Tr. 37-42, 86-90, 159-162, 366).

3. On June 20, 1969, public hearings were held on Pecord's petition. During the hearing, objections were made by the Local Ward Committeeman and Pecord's petition was deferred. (Tr. 90, 164-165). The effect of the deferral was substantively a denial but without a right to resort to the court system by Pecord.

4. Thereafter the Chicago City Council enacted an ordinance on June 27, 1969 preempting its own jurisdiction to grant "nursing home" zoning variances, and classifying such requests as "special uses". This special use jurisdiction was delegated to an administrative agency known as the Chicago Board of Zoning Appeals. The Chicago City Council thus created an administrative remedy for one seeking a "nursing home" use. The Respondents did not merely choose to pursue this remedy in July, 1969, but were compelled to exhaust such remedy as a condition of later seeking judicial relief for Pecord.

5. Shortly after the public hearings referred to in paragraph 3, but before the filing of Pecord's Special Use Request, there were a series of threatening telephone calls from Zima to Respondent. The substance of what Zima said in these telephone calls was that unless Pecord used Zima's attorney and paid a fee of $20,000.00, Zima would see to it that Pecord would never obtain the zoning, that the nursing home would never be opened and that Pecord would be forced into bankruptcy. (Tr. 46-51, 180, 371-372).

6. On August 15, 1969, a meeting occurred between Zima, Rosenthal and Respondent. The substance of the conversation at that meeting was that Rosenthal and Respondent told Zima that they were withdrawing from representation of Pecord because Zima's Special Zoning Counsel" appeared to be a hoax. Zima replied, in essence, that they could not withdraw, that he

had already incurred multiple obligations in the Pecord matter, and that he would see to it that his obligations were Respondent's obligations and that Rosenthal and Respondent must go ahead on the Pecord matter. Rosenthal then stated that he regarded Zima's threats as an attempt to intimidate him and an extortion of Pecord and that if the threats continued, Rosenthal would go to the Federal Bureau of Investigation. Zima repeated and persisted in his threats and stated that if the Federal Bureau of Investigation was informed of this matter neither Rosenthal nor Respondent would ever practice law again in the City of Chicago. (Tr. 56, 96-97, 196-198, 373-374.)

7. Respondent took the threats that "my obligations are your obligations" and that "you will never practice law again in the City of Chicago" to mean that the extortionist meant to make Carnow pay economically, physically or both. Respondent's knowledge of Zima's reputation was that Zima had a history of inflicting severe physical injury upon anyone opposed to him in a matter of material interest to him.[3] For many years Respondent had been a resident of the same community as Zima and had heard on many occasions that actual acts of physical violence were fostered and encouraged by Zima. By virtue of Zima's reputation; his conduct toward Respondent; the statements to Respondent; and Zima's interest in the Pecord matter, the state of Respondent's mind was that he then feared Zima would cause acts of physical violence to be inflicted upon him.

Respondent's testimony is illustrative of his state of mind:

> "I grew up in an area known as 'South Shore Valley', South Shore Gardens', which was east of the South Chicago Community and I went to high school and I lived there and in my college years, and I came to know that community very well and ultimately because a member of that ward organization and there's a certain tenor and there's a certain mentality about that community that I can't describe, but I think it's best described—I don't know if you read the Chicago Guide. There's one or two articles, one in November, one in December about Milltown, and there's a certain mentality. It's a very very tough mentality. It's a labor union-type mentality wherein political campaigns, physical violence was not uncommon, and in that ward, being a member of that ward organization, I came to know that Zima had members of—members of his ward organization who I can best describe as labor (g)oons (sic). I'm not saying he caused harm to be done, but, you know, when your opposition in a political campaign suddenly finds themselves with being assaulted or being involved in fights with bloodshed, and what have you, and a man sits back and tolerates it, he fosters it, he's primarily responsible for it, and those thoughts flashed in my mind and I believe that the people with whom he was associating could do physical harm, and as a result of it, I acquiesced." (Tr. 374-375).

3. Respondent's initial meeting with Zima at City Hall was a fluke. Carnow believed that Zima was only performing his official duties in providing procedural advice about City Council proceedings and was being genuinely friendly until there came a time in June, 1969, when it became evident that Zima had marked Pecord for a "Quick Buck" and extortion. Except in an instance where Carnow had been instructed by Rosenthal to find out what Pecord was up against, Respondent endeavored to cut-off all contact with Zima but found himself stalked as hunter stalks game. Zima found his mark in Mr. Carnow and exploited it fully.

8. Just after the August 15th meeting and in a conversation between Respondent and Rosenthal, Respondent informed Rosenthal that he was frightened and wanted to report the extortion notwithstanding the attorney-client privilege and the confidential relationship embodied in Cannon 4. (Tr. 197-198). Rosenthal then sought to withdraw but later concurred with his client, Joseph Pecord, that it would be immoral and unhumanistic to abandon a client when he faced bankruptcy and other harm because of the acts of an extortionist and that it would be a breach of the attorney-client privilege to divulge the client's confidence. (Tr. 132-135) Carnow considered Rosenthal being an older, more experienced attorney, to be scholarly, trusted him and looked to him as a mentor and teacher. Thereafter Carnow was "middled" by the client's plea not to abandon and the threats of the extortionist.

9. Respondent complied with Zima's demands because he wanted to prevent physical injury to himself and his family. (Tr. 374-375). There is nothing in the record which even slightly suggests that Respondent sought to influence the outcome of the Hearing.

10. In June and July, 1972, prior to the time Respondent discussed the Pecord matter with the agents, Zima sought out and told Respondent that there was an Internal Revenue Service investigation going on, that if Respondent should be contacted by the agents, Respondent better make sure that Zima's name never comes up, that Respondent tell Zima if he is questioned by the agents, and that Respondent say the right thing if he and his family wanted to remain healthy. During a chance encounter in early July, Respondent did tell Zima that agents were investigating the Pecord matter. Zima specifically told Respondent to use a "deadman's story". Zima said "you tell them you gave it to Garner, if you know what's good for your safety, your family's safety . . ." (Exhibit 1, pages 90-91).

11. On July 17, 1972, Respondent's automobile was severely burned in the driveway of his home; not by mere coincidence, this occurred on the very day of Mr. Carnow's meeting with the Internal Revenue Service agents. (Tr. 384-387).

12. Respondent's state of mind became one of utter confusion and desperation caused by both fear and severe depression. Almost immediately after the fire in his automobile and after seeing the agents, Respondent consulted Dr. William G. Fischer, a clinical psychologist. After the fire and while Respondent was consulting Dr. Fischer, Respondent received innumerable calls on his unlisted home telephone at all hours of the day and night. In the last week of August, 1972, a break-in was attempted at Respondent's home some time after midnight. Reference to brief excerpts of Respondent's testimony indicate the desperate mental state he was in at that time:

> "Threats had been made to me, and my family . . . I was so anguished that I took my family out of Chicago completely, . . . You know, I thought the world was coming in on me" (Tr. 396).

13. During the period Respondent had first met with the agents, he was clinically depressed and, in the professional opinion of Dr. William Fischer, evidenced symptoms of mental processes and conduct consistent with that of a person whose actions were motivated by extreme fear. (Tr. 212-217).

14. The immunity order entered against Respondent was primarily utilized as a vehicle by counsel, Joseph Lamendella, to obtain the speedy and totally committed cooperation of the Justice Department in protecting Respondent and his family. (Tr. 278-280) Such protection was committed.

15. During the entire period of Respondent's law practice, other than the Record matter, Respondent has always comported himself in a manner consistent with the highest tradition of the Bar. Respondent's reputation in the business and legal community is excellent and Respondent has willingly engaged in a vast number of *pro bono* matters and community interest cases to and including this day. (Tr. 109-110, 211-212, 220-221, 255-260, 266-268, 314-315, 318-319, 341-345, 352, 355-357). Respondent has also undertaken service to his community by serving on many Committees of the Bar, Community Groups and religious organizations.

Exceptions to the Conclusions of Law and Fact

1. The Review Board erred in applying the doctrine of *Stare Decisis* in applying its own February 28, 1977 *Kein* Decision (In re: *Kein*, Supreme Court Docket No. 49417—Decision pending—argued September 15, 1977) to this case and effectively holding that *under any circumstances* an attorney must be disbarred when he is involved in the payment of money. One must look to the man in the setting; the reason for the conduct; and the nature of his character. The doctrine of *Stare Decisis* can not be applied to attorney disciplinary matters. *In re: Nesselson*, 35 Ill. 2d 454, 461.

2. The conclusions and recommendations of the Review Board and Hearing Board are implicitly predicated on the concept that Respondent intentionally engaged in certain acts. However, the Administrator neither pleaded nor proved by clear and convincing evidence that Respondent's conduct was the product of fraudulent, dishonest or corrupt intent or motives. Respondent respectfully submits the failure to plead is violative of Respondent's 14th Amendment substantive due process rights and is a fatal error. *In re: Smith,* 356 Ill. 11 5 N. E. 2d 227. The clear and convincing evidence is that Respondent did not seek to influence the outcome of the Zoning Hearing. Rather his participation under severe emotional stress was to prevent physical and economic injury to himself, his wife and his children.

3. It is respectfully submitted that the Review Board and Hearing Board have failed to recognize that culpability requires "intent". A willful act requires not only that the act be intentionally performed but that it be voluntarily performed. Acts committed, under actual or threatened duress, coercion, physical force, or other compulsion ought not subject the actor to accountability.

4. In the absence of a clearly applicable statute requiring disclosure, or an intent on the part of a client to commit a crime, the attorney-client privilege prevents divulging client confidences. Respondent respectfully submits that under the peculiar factual circumstances, the recommendation of the Review Board to disbar is cruel, harsh and extreme. Respondent was the victim of an extortion who, by virtue of the threats made against him and the fear those threats generated, engaged in acts to prevent injury to himself, his wife and children.

5. The extreme sanction of disbarment should not be imposed against one who by all standards of justice, was the unwitting victim of the criminal conduct of another. Consideration should be given to the following facts:

A. Zima was adjudicated an extortionist by a jury of his peers.

B. Respondent's conduct was activated by fear and he yielded to Zima's demands to prevent physical and economic injury to himself, his wife and children.

C. Respondent never sought to influence the Hearing before the Chicago Board of Zoning Appeals, nor did his conduct obstruct the administration of justice of that agency.

D. After breaking the yoke of fear, Respondent's testimony aided the administration of Justice in the bringing about of the conviction of the extortionist.

E. The Hearing Board accepted all of Respondent's proofs of the merits of the Zoning Request, Respondent's attempts to withdraw, and efforts to avoid the extortionist.

F. Respondent was a mere youth of 26 years old in 1969, was engaged in private practice only six (6) months and licensed a little more than one (1) year at the time of the incident.

G. Joseph Pecord had not been Carnow's client.

H. Carnow's role was that of a subordinate or more nearly a law clerk.

I. Carnow never billed nor did he receive a fee for his activities.

J. Carnow relied upon the advice and opinion of Rosenthal, an older attorney, whom he viewed as a mentor and teacher in preserving the attorney-client privilege in not divulging confidences.

K. When a client was extorted and in a different setting, the Respondents reported the matter to the United States Attorneys Office in 1973.

L. Carnow's reputation in the business and legal community is excellent as attested to by his ten (10) character witnesses and thirty (30) Affidavits. He has served on numerous boards and committees of community organizations.

M. Respondent has unselfishly engaged in a vast number of *pro bono* matters and community interest cases, and

N. That Respondent has never had a previous complaint at the Bar.

6. The Complaint filed against the Respondent is predicated upon Supreme Court Rule 752, A. R. D. C. Rule 1-1 and D. R. 1-102(A)(5) and (6), Illinois Code of Professional Responsibility, which gives rise to the authority to discipline "conduct of attorneys which tends to defeat the administration of Justice or to bring the courts or the legal profession into disrepute." This standard has been unconstitutionally applied to the Respondent, and thus violative of Respondent's 14th Amendment Right to substantive due process of law in that the Complaint failed to plead "intent" to perform a fraudulent, dishonest or corrupt practice as an essential element thereof. See *In re: Ruffalo,* 390 U. S. 544. Substantive due process is required as a matter of law in attorney disciplinary proceedings.

Request for Brief and Oral Argument

It is respectfully suggested, because of the unusual nature of this case and because of the harsh recommendation that a briefing schedule be set and oral argument permitted. In support thereof, Respondent incorporates by reference his brief filed with the Review Board. For purposes of convenience, a copy is attached hereto and incorporated herein.*

Respectfully submitted,

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236-5517

* Attachment is not included in this Appendix.

APPENDIX E

No. 50098

IN THE SUPREME COURT OF ILLINOIS

In the Matter of
BENJAMIN JULIAN ROSENTHAL,
Attorney-Respondent.

Administrator's Decision No. 76-CH-36 +37 Consolidated Appeal from Disciplinary Commission.

PETITION FOR REHEARING

Introduction

This matter came before this Court as a result of disciplinary proceeding brought before the Attorney Registration and Disciplinary Commission. By its decision, this Court sustained the recommendation of the Commission that Respondents be disbarred.

Respondent's Penalty Should be Reconsidered

On page 3 of the slip opinion issued in this case, the Court states as part of its factual recitation as follows:

> "Zima informed the respondents that there would be no special counsel and that his 'obligations' were now theirs. Rosenthal objected and indicated that he would go to Federal Authorities, to which Zima responded that if Rosenthal did so, he and Carnow would never again practice law in the City of Chicago."

Through ironical happenstance Zima's threats have come to pass.

As it happened, Rosenthal and Carnow cooperated with the government prosecution and testified against Zima. As a result,

the United States Attorney in his August 7, 1975 letter to the Disciplinary Commission wrote:

> "Mr. Rosenthal was truthful at all times with agents of the Government, and likewise was readily available to assist us during our preparation for trial."

As an additional result of Respondent's cooperation with the United States Attorney's Office, the Disciplinary Commission was able to bring this matter to the Illinois Supreme Court upon a recommendation of disbarment. Respondent now faces the harsh reality of Zima's threat.

The Circumstances of This Case Do Not Warrant Disbarment

The harshness of the disciplinary measure exacted upon Respondent is impossible to rationalize in light of the many mitigating circumstances in this case.

> "The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood . . . The court should therefore disbar in moderation . . ." *In re Fisher*, 15 Ill.2d 139; 154 (1958).
>
> "Such duty (to protect the public from improper practices), and the manner in which it is exercised, must not be despotic . . . The courts must not exercise their supervisory control in an arbitrary manner, but must show a legal discretion in the exercise thereof." *In re Donaghy*, 402 Ill. 120 (1948).

Neither the Disciplinary Commission's charges nor the evidence in the record could sustain a finding that Rosenthal and Carnow were guilty of the crime of bribery or extortion. In light of all Illinois precedent, only such a conviction (or a definitive disciplinary charge of those crimes with sufficient evidentiary support) could warrant the ultimate discipline exacted in this case.

If it is implicit in the Court's opinion that Respondents were guilty of extortion or bribery, then Respondents have been deprived of their fundamental Sixth Amendment right to know the

nature of the accusations against which they must defend. *In re John Ruffalo, Jr.*, 390 U. S. 544 (1968).

If it was not the intent of this Court's opinion to imply that Respondents were guilty of extortion or bribery, this Court, in deciding to disbar Respondents must have overlooked the multitude of mitigating elements which clearly emerge from the record. For instance:

1. This matter was an isolated incident which occurred in 1969. Neither prior to that time nor since that time have Respondents tainted their otherwise spotless careers. In fact, prior to the Zima extortion, they and their client, Pecord, refused to buckle under to the demands of John Daley (which caused them the loss of that project) (see Abstract, pp. 88-89); and after the Zima incident, they brought another client, Norman Katz, directly to the U. S. Attorney's Office to report an attempted extortion (which resulted in a declined prosecution) (see Abstract, pp. 204-205).

2. Respondent throughout the Zima extortion had advised his client not to give in, and always expressed opposition to the course of action finally taken (see Abstract, pp. 77-80, 87-88;[1] see also p. 60 of the Supplemental Abstract).

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1. It may be helpful here to reproduce the abstracted testimony of Thomas Gordon which appears on Abstract pages 87 and 88:

> "I did have occasion to meet Ben Rosenthal and Joe Pecord in the period of July and August, 1969. Only Pecord and Rosenthal were present.
>
> "At that time, Pecord was very, very distressed that he was being extorted for monies for zoning. He wanted Rosenthal to implement the zoning however he could. There was a discussion that there would be other counsel involved. Rosenthal indicated to Pecord that he should go to FSLIC or some other government agency and get an extension of time. Rosenthal said he did not agree that the passing of money was a way to do it; that Pecord was insisting that he had no time; and that time had run out; and that he, Rosenthal, was not the one to handle the situation on that basis. So there was much arguing back and forth. Rosenthal, at that meeting offered to go to Washington with Pecord to see if he could implement a kind of extension with FSLIC.

(Footnote continued on next page.)

3. Respondent throughout the Zima affair acted completely without personal profit motive.

4. The only motive behind the payment to Zima was to achieve a zoning variance *to which they were legally entitled.* It was not to achieve the obstruction of justice but to remove such obstruction.

5. Respondent's participation in this matter was strictly for the benefit of his client, who stood to face personal bankruptcy if the zoning was not obtained, in light of the FSLIC's refusal to grant an extension of time sufficient for a court action. (See Supp. Abst., p. 60; Abstract, p. 87).

6. Respondent was advised he could not abandon his client in such circumstances. (See Abstract, pp. 158-159).

7. Respondent received threats by Zima, not only against himself, but also his family, if Respondent did not go along with Zima's program.

8. Respondent is praised and endorsed by his peers and many clients through testimony and affidavits, which appear in the record. (See Supp. Abstract, pp. 76-98, 125-130; Abstract, pp. 174-223.)

9. Respondent has had an exemplary legal career, participating in many community endeavors, reflecting therefore to the benefit of his profession.

If these mitigating facts have not been taken into consideration, the Respondent implores this Honorable Court to do so and to reconsider its decision which is tantamount to professional capital punishment.

(Footnote continued from preceding page.)

> Rosenthal suggested strongly that they go into the courts and bring this thing out into the open and that was the only way he could handle it. Pecord indicated that he knew these people, he had dealt with them before, and that it was a personal animosity between him and (John) Daley. Pecord said he just knew that this thing was going to die, that it was not going to get extended, and that he had explored that to the best of his ability."

If, in fact, these elements have been taken into consideration, and the Court declines to modify the decision to disbar Respondent, then such punishment is cruel and unusual and in violation of Respondent's 14th Amendment right to equal protection under the law, as well as in violation of his 8th Amendment right to be protected from cruel and unusual punishment.

There is no disciplinary precedent for disbarment, especially in this case in the face of the mitigating factors outlined above.

We must repeat a quote from *In re Leonard,* 64 Ill. 2d 39 (1976):

> "We recognize . . . that our disciplinary system must not become mechanistic, ignoring the significance of mitigating factors. Except for respondent's involvement in the present situation, his record of personal and professional service exemplifies a commitment and an awareness of the highest ethical standards."

Why does this learned language not apply to the matter of Benjamin J. Rosenthal? Leonard entered a plea of guilty to conspiracy to promote the bribery of Paul Powell and to assist in the preparation of fraudulent income tax returns. He was suspended for three years (retroactive to the date of his voluntary withdrawal from the practice of law). *In re Kayne,* 53 Ill. 2d 410 (1973), dealt with Kayne's bribery of an Internal Revenue Agent; Kayne was suspended for one year. *In re Kien,* 69 Ill. 2d 355 (1968), dealt with the bribery and subordination of perjury of a police officer; Kein was suspended for eighteen months. *In re Walker,* Ill. 2d 48 (1977), dealt with an attorney found guilty of filing false income tax returns; Walker was only censured for this offense. *In re Cook,* 67 Ill. 2d 26 (1977), Cook had perjured himself for his own benefit and aided and abetted the cover-up of an illegal $250,000 cash contribution; he was suspended for only sixteen months. *In re Sherre,* 68 Ill. 2d 56 (1978), Sherre was convicted of four counts of mail fraud; Sherre was suspended for three years.

See also other attorney-bribery cases: *In re Ellis,* 371 Ill. 113 (1939), where the attorney was suspended for two years for making several campaign contributions to the Chairman of the State Tax Commission on behalf of a client; *In re Tuttle,* 371 Ill. 153 (1939), where the attorney was suspended for two years for engaging in a course of conduct involving the bribery of the head of the State Tax Commission; *In re Huff,* 371 Ill. 198 (1939), Huff was suspended for two years for payment of bribes to the Chairman of the State Tax Commission; *In re Howard,* 69 Ill. 2d 343 (1978), dealt with an attorney bribing a policy officer with intent to influence his testimony; for stating that other payments would be paid to influence the prosecutor and Judge and for lying before the Review Board; Howard was suspended for three years.

The New York Court suspended two attorneys for six months for bribing an Internal Revenue Agent to decrease the unreported income of a client, for which they served two weeks in prison on a plea of guilty. (*In re Fenton,* 313 NYS 2d 636 (1970). The New York Court took into consideration the fact that no other complaints had ever been filed against the attorneys, who previously had enjoyed an excellent reputation and the fact that they only received a $100 fee for their work. Rosenthal received no fee from his client in the case at bar for his zoning efforts, has an excellent reputation—legally and personally—and has always given generously of his time to his clients and the community.

In another New York case, *In re Goldstein,* 320 NYS 2d (1971), an attorney was suspended for three years for making 64 bribery payments over an extended period of time to Internal Revenue Agents assigned to audit his clients. The suspension was given in light of Goldstein's cooperating with the United States Attorney's Office and in light of his prior record as an attorney.

Except for the case of *In re Schwarz,* 51 Ill. 2d 334 (1972), where it was proven that respondent engaged in a pattern of

payoffs to a Judge to encourage the obstruction of justice, no case involving official bribery had resulted in disciplining an attorney exceeding a three-year suspension. In light of the 1978 case of *In re Sherre,* 68 Ill. 2d 56 (1978), where the court only suspended Sherre for three years in the fact of his conviction on four counts of mail fraud, disbarment in the instant case seems irresoncilably severe. We point to *In re Kien* as the most recent case involving the payment of monies to a public official. Kien was suspended for 18 months. Under the facts of the instant case, and in light of all the mitigating circumstances, rationale dictates that Rosenthal's penalty should be minimal. Certainly the Court must recognize that this unfortunate incident occurred nine years ago, with Respondent's conduct being exemplary since that time. He has obviously become totally rehabilitated since 1969, and the Court should place major importance on this fact.

Respondent was not charged with bribery or extortion; was never previously involved before or since Zima; did not act for his own benefit with respect to the Zima payment; and in no way sought to obstruct justice or obtain anything other than that to which his client was legally entitled. Respondent's career has otherwise been laudable. Respondent's cooperation with the Department of Justice brought about Zima's conviction. It should not now be the cause of his disbarment.

Conclusion

Respondent prays that this Honorable Court reconsider its decision, and that Benjamin Julian Rosenthal be allowed to continue in the practice of law.

Respectfully submitted,

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APPENDIX F

IN THE SUPREME COURT OF ILLINOIS

In the Matter of DONALD S. CARNOW, *Attorney-Respondent.*	Administrator's Decision No. 76-CH-36 + 37 Consolidated Appeal from Disciplinary Commission

PETITION FOR REHEARING

May it please the Court:

A judgment of disbarment is the professional equivalent of a capital penalty. We would suppose, therefore, that it is likely that petitions for rehearing are filed in all such cases.

Statistical experience augurs poorly for such petitions. We think it appropriate, therefore, to offer a preface: this is not a routine petition.

Brevity is commanded by Rule 367. It is also dictated by reason itself. We will not yield to the desire or temptation to reargue the case. Instead we proceed directly to the gravest of issues.

The Penalty

The opinion states that the Court finds basis for mitigation of the penalty imposed on respondent Carnow (slip opinion, p. 7). On that basis we feel free to urge, respectfully but vigorously, that it is clearly wrong to impose upon him the ultimate penalty. That is a penalty which, by definition, is reserved for cases

where mitigation is not to be found. And it exists here in abundance, past accomplishments aside.

Respondent gave false information to a federal agent; but with his car set afire on the morning of the appointment with the agent, what assurance could respondent have there were no leaks in the federal investigative chain? The Court points out that there had been other automobile fires in that area; but there is no evidence that such fact had come to Carnow's attention. So far as he knew, he had been singled out to receive a warning. If he had a duty to the federal government, he also had a duty to his wife and children. If this Court feels that he guessed wrong, it should not treat the offense as capital.

While respondent had a duty to the federal government, he also had one to his client. Petitioner perceived a codified obligation of balance going far beyond confidential communications. He was bound to withhold information "the disclosure of which would be embarrassing or would be likely to be detrimental to the client" (Dr. 4-10). The client would literally lose his shirt if denied the rezoning to which he was clearly entitled. He would be denied that rezoning unless Zima were paid. Complaint could be made of Zima's activities only at the expense of the client's financial ruin. Again, if respondent made the wrong choice, the penalty should not be capital.

Respondents did not initiate the course of misconduct. They found themselves in a totally corrupt milieu. Indeed, Carnow originally undertook only ministerial duties in respect to the rezoning, acting essentially as a messenger in a space-for-services arrangement. If Carnow's response was less heroic than might have been wished, it is equally true that he made *no* policy decisions in the matter.

* * * * *

It is probably true that most extortion schemes involve attorneys (slip opinion, p. 6). That fact, however, is due to the circumstance that most victims become vulnerable to official ex-

tortion precisely because they are in situations requiring legal service. The direction of the extortive activity against the attorney reflects a cynical awareness that he dare not complain lest he render himself vulnerable to professional retaliation by the extortionist and his then political cronies.

It was not, however, professional concerns alone which counselled silence to the petitioner. The matter went much further: direct and realistic threats against the persons of his wife and children. Perhaps the ideal response would have been a refusal to knuckle under; but a failure to rise to that level of valor does not merit disbarment.

The Court cited *U. S.* v. *Kahn,* 472 F. 2d 272, for the proposition that surrender to illegal coercion should not be "a *total* defense to bribery chrarges". (slip opinion, p. 6, emphasis added) Implicit in the quoted language is the proposition that with equal force, such yielding to the force of circumstance does not constitute "total" guilt.

* * * * *

It should also be remembered that we are talking about stale facts. The transaction with Zima occurred nine years ago. Conversation with the federal agents occurred in 1972.

The transaction with Zima was an isolated incident, in no way reflective of a pattern in the respondent's practice.

For many years following the last of those events, respondent has practiced law honorably and has given no grounds for complaint.

If there was culpability, there is also total rehabilitation.

Any rational penalty must take account of that fact.

* * * * *

Mitigating factors abound in this record; the penalty should reflect those factors.

The Nature of the Offense

The last observation made above suggests yet another serious issue. It is, we suggest, quite telling that the administrator charged respondents with "participation in and facilitation of an *extortion* scheme" (slip opinion, p. 1, emphasis added) while the opinion reflects a judgment that the respondent has committed an act of *bribery.*

Clearly, the respondent paid no bribe. He merely surrendered to extortion. The opinion points out that he demanded proof of the rezoning as a condition of the delivery of the money. But in the circumstances, that is no more evidence of willing participation than would be a failure to deliver ransom without a prior assurance of the safety of the kidnap victim.

Respondent has not been guilty of bribery. Moreover, he was charged with extortion, not bribery. The fundamental Sixth Amendment right to know the nature and cause of the accusation, applicable in disbarment proceedings, (*In re Ruffalo,* 1967, 390 U. S. 544, 550) should preclude his capital conviction of a crime never charged against him.

Constitutional Objections to the Penalty

Exaction of the ultimate penalty in this case constitutes denial of the Fourteenth Amendment right to equal protection of the laws. With equal force, given the circumstances, it denies both state and federal constitutional protection (Eight and Fourteenth Amendments) against cruel and unusual punishment.

This Court has frequently held that although uniformity of penalty is desirable, each case must be decided upon its own merits (*In re Andros,* 64 Ill. 2d 426 (1976)) in the light of "the particular factual situation presented", *In re Leonard,* 64 Ill. 2d 398, 404 (1976). In its application to the gravest of all possible penalties, constitutional standards require at a minimum that the penalty be proportioned in accordance with the

degree of culpability and bear some logical relationship to that imposed in comparable cases, thus insuring reasonable proportionality to the nature of the offense. Cf. *Furman* v. *Georgia*, 408 U. S. 238 (1972).

The inappropriateness, under the facts of this case, of the imposition of the ultimate penalty is rendered pellucid by comparison with the sanction imposed in *In re Cook* (1977), 67 Ill. 2d 26. (See also, *State ex rel. Nebraska Bar Association* v. *Cook*, 194 Neb. 364, 232 N. W. 120, from which the predicate facts may be determined.) An effective sixteen-month suspension was imposed on Cook. This respondent faces disbarment. Some comparison is in order.

	Cook	Respondent
Age at time of offense:	45	26
Did offense involve misuse of official status?	Yes	No
Did offense involve misconduct in the fact of the court?	Yes	No
Was the lawyer's ultimate testimony rejected by the trial jury as false?	Yes	No
Amount of money mishandled:	$250,000	$20,000
Did the attorney derive meaningful personal gain from his misconduct?	Yes	No

Cook, of course, is a spectacular case involving the gravest of misconduct at the highest levels, threatening the very structure of the republic. But even by the standard of more mundane cases, the penalty exacted here is unreasonable. By comparison, we cite:

(a) *In re Howard* (1978) 64 Ill. 2d 343—a two-year suspension was enforced for bribing a policeman to influence his testimony; for stating that other payments would be made to influence the prosecutor and the judge in the case in which the lawyer was appearing; and for lying before the review board.

(b) *In re Leonard* (1976) 64 Ill. 2d 398—a three-year suspension for aiding and bribery, falsifying records and participation, resulting in criminal conviction, in corruption involving the office of the Secretary of State.

(c) *In re Tuttle* (1939) 371 Ill. 153—a two-year suspension for bribery of the head of the State Tax Commission over a protracted period.

(d) *In re Huff* (1939) 371 Ill. 198—a two-year suspension for protracted course of bribery of the Chairman of the State Tax Commission.

Cook, therefore, certainly does not stand alone as a predicate for the constitutional objection to the penalty imposed on this respondent. The *Cook* disciplinary proceedings originated in Nebraska. But this Court did simply enforce the Nebraska judgment; an independent proceeding was instituted. And if authority from other states would be deemed persuasive, we would cite such cases as *In re Goldstein* (1970) 320 NYS 2d 299, in which an attorney who had made 64 bribery payments to Internal Revenue agents over an extended period was punished by a three-year suspension. *In re Fenton* (1970) 313 NYS 2d 636, adjudged a six-month suspension against two attorneys who had bribed an Internal Revenue agent, thereby establishing that the penalty in *Goldstein* was not an atypical exercise of compassion.

We do not challenge this Court's authority to establish its own standards for discipline within this State. But we think that *Cook* must be placed in proper perspective, and we urge that a punishment standard which will permit the ultimate penalty where strong and relevant mitigation appears, should have no place in a logical system of justice.

The Existing Injury

By its opinion, this Court has set the highest standards for our profession, as it should. The opinion's deterrent effect has already been created. It would be no less desirable that the Court also demonstrate its collective compassion for human suffering.

Respondent Carnow and his family had suffered enormously even before general publication of the Court's opinion on October 6. The recent newspaper notoriety has cast him into disrepute in the community. Simply put, the respondent and his family have suffered, and their dreams and aspirations have been destroyed no less thoroughly than has their source of livelihood. This Court has never before been so harsh under such strong mitigating circumstances.

Conclusion

For the foregoing reasons, we pray that rehearing be granted and that respondent be authorized to continue in the practice of law.

Respectfully submitted,

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No. 78-1180

In the
Supreme Court of the United States
October, Term, 1978

BENJAMIN JULIAN ROSENTHAL,
Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,
Respondent.

REPLY ON CERTIORARI

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REPLY ON CERTIORARI

MAY IT PLEASE THE COURTS

Respondent Commission has made two arguments against this Petitioner at Points I and III of its Brief. Neither should pass without response. (Point II of Respondent's Brief is addressed to Petitioner Carnow and has already received his response.)

I.

On Pages 4 and 5 Respondent argues that Petitioner has failed to timely raise any Federal questions. Respondent, by the simple device of attaching a few appendices to its Brief, ignores the fact that the entire proceedings are replete with Federal and Constitutional questions

raised both directly and indirectly and in written Briefs, as well as in oral arguments.

The Commission further disregards the critical fact that it is merely an administrative agency of the Illinois Supreme Court and could not usurp the judicial function of imposing the penalty of disbarment. Thus the Illinois Supreme Court was in effect a Court of first impression, since there could be no such discipline without it first having rendered its decision. Only after the Illinois Supreme Court's decision of October 6, 1978 was an Order of Court first entered that ROSENTHAL be disbarred. Only then was it apparent to ROSENTHAL that the Supreme Court, by implication, was treating ROSENTHAL as one who had a *corrupt motive,* or *an intent to bribe* so as to justify disbarment. The Complaint filed by the Commission only contained broad generalized charges and there was no allegation of corrupt motive or intent to bribe. (Appendix E to Petitioner's Brief.) Such an implication could not have been reasonably anticipated by ROSENTHAL in light of the Hearing Panel's findings of fact that ROSENTHAL was ". . . retained by Pecord for a lawful legal purpose, i.e., to obtain a zoning variance . . . but that the variance was denied him because of political implications brought forward by the Ward Committeeman . . . (that) Zima, then the Secretary to the Committee of Building and Zoning was in a position to see to it that Pecord's request for a variance was either granted or denied".

As soon as the Illinois Supreme Court, acting as a Court of first impression, rendered its decision, ROSENTHAL promptly filed his Brief for a Rehearing raising Constitutional questions which were first evoked by the Court's opinion. The Commission in its Brief cites with

approval the case of: *In the matter of John Ruffalo, Jr.,* 390 U.S. 544, which holds that procedural due process requires a Complaint containing fair notice of the alleged offense.

The Constitutional question pertaining to immunity was raised at the time of the initial Hearing and was never waived. (Respondent acknowledges in Footnote 2 that ROSENTHAL had asserted immunity as an affirmative defense before the Hearing Panel. It fails to state that ROSENTHAL submitted a Brief in support thereof, which Brief is part of the record.)

In Point II of its Brief, Respondent acknowledges that Carnow raised Constitutional and Federal questions. Clearly Federal and Constitutional questions raised by Carnow should pertain to ROSENTHAL, as well as vice versa since the case against Carnow and ROSENTHAL arose out of the same factual situation, was heard together and was argued before the Illinois Supreme Court as one case.

In short, Federal and Constitutional questions were timely raised. The cases cited by Respondent Commission are not applicable to a disciplinary case such as this where Constitutional issues arose for the first time when the Illinois Supreme Court rendered its decision.

III.

Finally, the Respondent states that the Court should not intercede in this matter simply because, in the proceedings below, this Petitioner was "afforded notice of the charge and an opportunity to defend". The same is true, however, of the disciplined lawyers whose cases were considered in *Spevack* v. *Klein,* 385 U.S. 411 (1967) and *In re: Ruffalo,* 390 U.S. 544 (1968). Those cases, acknowledged as authoritative by Respondent's Brief, support Petitioner ROSENTHALS's position.

In considering ROSENTHAL's due process rights it should be remembered that the Commission was the agent of the Illinois Supreme Court. Thus, the Commission and the Illinois Supreme Court were in effect both prosecutor and finders of the facts. Is it not fundamental that in such situations Petitioner ROSENTHAL should be entitled to the review of Constitutional questions by at least one reviewing Court lest there be an abandonment of the fundamental safeguards of our jurisprudence?

Respectfully submitted,

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